

***United States Court of Appeals  
for the Second Circuit***



**JOINT APPENDIX**





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77-7103  
77-7115

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**United States Court of Appeals**

For the Second Circuit

CANDACE VAN ALLEN,

*Plaintiff-Appellant-Appellee,*

*—against—*

DOMINICK & DOMINICK, INCORPORATED and  
PAUL deGIVE,

*Defendants-Appellees-Appellants.*

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**JOINT APPENDIX**

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**VOLUME II**

Pages A-278 — A-572

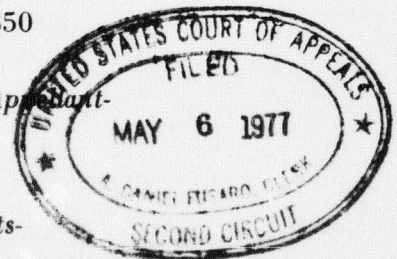
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9

1

2

Q That your account was worth that much?

3

A On February 15.

4

Q Thank you.

5

A On that day.

6

Q Do you recollect what your account at Dominick &

7

Dominick was worth as of 1967?

8

A No, I don't.

9

Q Prior to the loan you took out from the First

10

National City Bank in October 1969, had you taken out

11

other loans for the purpose of buying securities in the

12

previous years? By the previous years, I mean from 1953.

13

A Yes.

14

Q Do you remember how many?

15

A Not offhand. Two at least.

16

Q Two at least.

17

A Whenever Mr. deGive asked me for more money, I

18

got it for him.

19

MR. BARIST: I move to strike "every time Mr.

20

deGive."

21

MR. SHAFFER: I oppose the motion, Judge. I

22

think it is helpful.

23

THE COURT: Motion denied.

24

Q Do you remember when was the first time you

25

took out a loan?



A No, I don't remember.

Q Let me show you Defendants' 38, which is in evidence, and 39 -- no, withhold 39. Let me show you 38 in evidence.

THE COURT: Whose 38?

MR. BARIST: Defendants' 38.

THE COURT: All right.

Q -- in evidence, and ask you to read 38 and ask you if that refreshes your recollection that as of June 1955 you had a loan of moneys collateralized by Lehigh Valley Railroad stock.

A Yes. It says that here.

Q As a matter of fact, Mrs. Van Alen, did you object to the bank's paying down that loan?

A I don't know.

Q Let me show you Exhibit --

A You want me to read this letter?

Q No.

A Because it is very hard to read. I am having terrible --

Q We are finished with it, Mrs. Van Alen.

I am going to hand you Defendants' 39 for identification.

MR. BARIST: Since that one is a holographic

1 letter and we had you read it into the record on the  
2 deposition, and since I am going to offer it anyhow, I  
3 will offer it, Mr. Shaffer, 39, and it is read into the  
4 record at 59 on the deposition of Mrs. Van Alen.  
5

6 MR. SHAFFER: What is the date of the letter?

7 MR. BARIST: 5 June 1955. I have offered 39  
8 in evidence. It is page 59 in the deposition.

9 THE COURT: Where are we?

10 MR. SHAFFER: Your Honor, he has offered  
11 Exhibit 39.

12 MR. BARIST: I have offered 39.

13 MR. SHAFFER: And it appears at page 59 of the  
14 deposition. I am just going to look at it for a second,  
15 if I may.

16 THE COURT: All right. Defendants' offer is  
17 of Defendants' 39 for identification.

18 MR. SHAFFER: Your Honor, without making this  
19 thing unduly burdensome, the letter apparently is  
20 holographic, as Mr. Barist said. I would respectfully  
21 suggest, although I cannot direct his examination, that  
22 he show Mrs. Van Alen the transcript of the letter  
23 appearing in the deposition exhibit and ask her does it  
24 refresh her recollection. If she says no and he wishes  
25 to offer it at that time, if it is received for the



1 limited purpose of a prior inconsistent statement from  
2 her recollection, I have objection to its being  
3 received for that purpose.  
4

5 MR. BARIST: I have already asked the question  
6 if she recollected protesting a loan being paid down in  
7 1955. She said no. I am now offering 39 for identifica-  
8 tion because it is a letter written by her in her own  
9 handwriting which does so protest.

10 THE COURT: Received.

11 (Defendants' Exhibit 39 received in evidence.)

12 MR. BARIST: May I read it into the record,  
13 your Honor?

14 THE COURT: If you wish.

15 MR. BARIST: "Repulse Bay Hotel, Hong Kong,  
16 5th of June, 1955.

17 "Dear Paul: The enclosed caught up with us in  
18 Taipei. Watson sent it on to us. Did you know about this?  
19 If not, how did the bank happen to sell it and do you  
20 approve? I realize you cannot write me all this news,  
21 as we shall be en route home, but you can look into it  
22 anyway in case you don't already know about it.

23 "Also the bank took some money from sale of  
24 stock to pay off a loan we had there. Jimmy and I are  
25 annoyed as we never ordered such a thing. There was an

XXX

1  
2 old order on it from the time we sold the first Lehigh  
3 stock, but it was not to apply forever. Since they  
4 acted so strangely over the \$50,000 you were supposed  
5 to be given to invest and they let six months or so go  
6 by making some excuse to you and now this paying off of  
7 loan, I am wondering just what the sale of the Allied  
8 Stores Corporation is and whether you approve.

9 "We are having a fascinating time. Formosa  
10 was a revelation. So industrious and not at all panicky.

11 "We plan to be home by July 6. Should you  
12 want us perhaps Grace Watson could tell you where we  
13 shall be. Otherwise a letter to Claridge's, London,  
14 mailed hold should reach us about July 1.

15 "Hope Eleanor and the children are fine once  
16 again, also you. Our best to you both. Candy.

17 "P.S. Will you please send the papers etc.  
18 back to Newport."

19 Q Mrs. Van Alen, do you recollect whether you  
20 had a loan in 1962?

21 A No, I don't recollect.

22 MR. BARIST: Let me offer Defendants' Exhibit 25  
23 in evidence. For the record it is a letter from Mrs.  
24 Grace Watson to Mr. Pugh at the Empire State Company in  
25 regard to a note for \$25,000.



1 [302]  
2 MR. SHAFFER: I object to it.

3 MR. BARIST: That is under date of September 21,  
4 1962.

5 MR. SHAFFER: I will be happy to state my  
6 grounds if you would like.

7 THE COURT: All right.

8 MR. SHAFFER: Your Honor, he is cross-examining  
9 the witness with respect to her statement that she does  
10 not recall matters about a particular fact he asked.  
11 Then he offered in evidence a letter. The letter is not  
12 written by Mrs. Van Alen, it is written by Miss Grace  
13 Watson.

14 I would assume that the offers if received by  
15 the Court in evidence are received for the limited  
16 purpose of determining an assessment of the witness'  
17 credibility and that he has a right to impeach her by  
18 the use of any prior inconsistent statement. The usual  
19 way is to confront the witness with a prior inconsistent  
20 statement and read it to her, and the Court sees the  
21 interreaction between the statement and the witness'  
22 testimony on whether it refreshes her recollection or it  
23 does not. If it does not --

24 THE COURT: I don't understand the offer to be  
25 limited to just impeachment purposes.

1 [303]  
2 MR. BARIST: No, your Honor. And I am going to  
3 tie these loans in to the whole investment intent very  
4 quickly, I assure you.

5 MR. SHAFFER: If it is in proof of the loan --

6 MR. BARIST: It is also in proof of the loan.

7 MR. SHAFFER: -- if he wants to prove the loan  
8 as a fact, OK, I withdraw my objection.

9 THE COURT: Received.

10 (Defendants' Exhibit 25 received in evidence.)

11 MR. BARIST: Let me read quickly Exhibit 25.

12 MR. SHAFFER: If he is going to do that to  
13 prove the loan, I concede it, maybe save a little time.  
14 But if he wants to do it his way, he can. I am just  
15 trying to help.

16 MR. BARIST: I appreciate your help, Mr.  
17 Shaffer.

18 MR. SHAFFER: It is not up to me.

19 THE COURT: Go ahead.

20 MR. BARIST: Letter dated September 21, 1962,  
21 from Mary Grace Watson, signed secretary to Mrs. Van Alen,  
22 addressed to Pugh, Empire Trust.

23 "Enclosed you will find signed note for  
24 \$25,000 and the signed authorization to place the  
25 securities under lien, as well as the signed form to

XXX



1  
2 comply with regulation U of the Federal Reserve Board,  
3 all signed by Candace C. Van Alen.

4 "On September 25 Mrs. Van Alen will issue a  
5 check which will include the above mentioned \$25,000."

6 I will skip the rest of it as irrelevant for  
7 my purposes at this point.

8 Q Do you remember if in 1963, Mrs. Van Alen,  
9 you had a loan of approximately \$179,000 from the  
10 Empire Trust Company?

11 A No, I don't.

12 MR. BARIST: Let me offer Defendants' 27 in  
13 evidence, letter from deGive to Candace C. Van Alen,  
14 under date of July 19, 1963.

15 MR. SHAFFER: Your Honor, I want to concede the  
16 fact if it helps, but I don't want to interrupt Mr.  
17 Barist.

18 THE COURT: 19 what?

19 MR. BARIST: The letter is dated July 19, 1963.

20 THE COURT: The point is conceded.

21 MR. BARIST: Which point?

22 MR. SHAFFER: That there was a loan in that  
23 amount.

24 MR. BARIST: I so offer it in evidence.

25 MR. SHAFFER: I have no objection. I am just

1                   trying to help.

2                   THE COURT: Received.

3                   (Defendants' Exhibit 27 received in evidence.)

4                   Q     Do you recall, Mrs. Van Alen, that in May of  
5                   1967 you had a loan from the Bank of New York in the  
6                   amount of \$100,000?

7                   MR. SHAFFER: I take the same position, Judge.

8                   THE COURT: Conceded.

9                   MR. BARIST: But I think, your Honor, I am  
10                  entitled to the witness' testimony on that, without  
11                  counsel's concession.

12                  THE COURT: Well, not necessarily. If the point  
13                  is something you are trying to establish, it is established  
14                  when your opponent says it is not controverted but is  
15                  conceded.

16                  You can make your reference, if you wish, to  
17                  the document marked for identification or otherwise.

18                  MR. BARIST: As long as it is conceded, I will  
19                  skip adding to the record on this one.

20                  Q     Mrs. Van Alen, do you recollect that there were  
21                  any other loans besides the ones we have mentioned, the  
22                  one in 1955, the loan in 1962, the loan in 1963, for  
23                  \$179,000, the loan in 1967 for \$100,000?

24                  A     No, I don't recollect.



1 [306]  
2 Q Does it refresh your recollection if I said  
3 that from at least 1962 or 1963 through 1968 you had a  
4 loan of approximately \$100,000 or more from the Bank of  
5 New York for the purpose of buying securities and that  
6 this loan kept being rolled over and was paid off only  
7 when you were out of the market completely?

8 A No, I don't know that.

9 Q But we have established that there were at  
10 least four loans prior to 1969.

11 MR. SHAFFER: Your Honor, we have established  
12 what we have established, and I think we are really  
13 arguing with the witness. You are going to determine  
14 what has been established, what Mr. Barist has proven  
15 over her recollection.

16 THE COURT: Next question.

17 Q You were aware in this period, Mrs. Van Alen,  
18 that bank loans were very risky? It was very risky to  
19 take a bank loan to buy securities?

20 A There is always a risk, some greater than  
21 others.

22 Q But is it not very risky to take a bank loan?

23 THE COURT: She says it was always a risk.

24 Q Let me read this question from your deposition,  
25 page 293:

1 [307] Van Alen - cross A-288  
2 "Question: Did you have any discussions with Mr.  
3 deGive about the tax consequences of paying an interest  
4 rate on the loan?

5 "Answer: I don't know what you mean by tax  
6 consequences. You mean the interest rate comes off your  
7 income tax, you mean?

8 "Question: Yes.

9 "Answer: No, but I know that happens. But on the  
10 other hand you still have to pay on it. That's --  
11 nothing comes for free. It's very risky to take a loan.  
12 It's against my Scottish-Swiss nature."

13 A I stand by that.

14 Q And you stand by that for the period from  
15 1963 to 1968? Would you also stand by it then?

16 A All my life.

17 Q Thank you. Did you ever suggest to Mr. deGive  
18 that he sell short --

19 A No.

20 Q -- in your account?

21 A No.

22 Q Did you ever discuss it with him?

23 A No. He may have mentioned it, but we never --  
24 I never gave Mr. deGive any instructions whatsoever.

25 Q Did you ever make any recommendations to him



1                   [308]                   Van Alen - cross                   A-289  
2                   whatsoever about stocks?

3                   A       No.

4                   Q       Wouldn't you sometimes suggest a stock to Mr.  
5                   deGive if one of your friends would tell you something  
6                   about a stock they thought was very hot?

7                   A       Perhaps.

8                   Q       Let me read you this question and answer from  
9                   page 107 on your deposition:

10                  "Question: In the period when Mr. deGive was  
11                  handling the account well for you, did you ever suggest  
12                  any investment decisions to Mr. deGive?

13                  "Answer: Well, sometimes friends would tell me  
14                  something they thought was very hot or something and  
15                  so I called Paul and asked him what he thought about it."

16                  Does that refresh your recollection?

17                  MR. SHAFFER: Your Honor --

18                  A       That was just --

19                  MR. SHAFFER: -- I object to this. He can  
20                  read the deposition, but he has not done anything with  
21                  respect to the previous answer. Since she is an adverse  
22                  witness, you can use a deposition for any purpose, so I  
23                  cannot stop him from reading it, but I think I can  
24                  object to any further reference to that in that refrain,  
25                  because it is not an impeachment of what she said.

THE COURT: You can use it on the recall aspect.

Q Does that refresh your recollection, Mrs. Van Alen?

A Yes.

Q Thank you. Do you remember recommending or asking Mr. deGive to buy stock -- suggesting, to rephrase the question -- that Mr. deGive was doing well in the account? Did you ever call him up and suggest that he buy a stock?

A Never.

Q Did you ever discuss with him buying a stock which was not listed on the New York Stock Exchange?

A He told me about that.

Q Excuse me?

A I recall.

Q I am sorry, I cannot hear you.

A He told me about a stock. It calls into the category of the question you asked before, whether friends have some suggestion. And a friend had a suggestion. And so I spoke to Mr. deGive about it, asked him what he thought, just mentioned it to him.

Q And he did not buy the stock, right?

A No, he did not buy it. And I remember that



1  
2 one because he said it wasn't listed on the stock  
3 exchange. Well, I was surprised, I thought every stock  
4 was listed somewhere. That's why I remember it.

5 Q But you called Mr. deGive to ask him his  
6 opinion about this stock, right?

7 A No, just to mention.

8 Q Just to mention. And he advised against it  
9 because it was not listed on the stock exchange?

10 A That's what he said.

11 Q Did you ever have Miss Watson ask Mr. deGive  
12 to inquire about a life insurance company's stock?

13 A A life insurance company?

14 Q A life insurance company stock.

15 A I don't recall.

16 Q I show you Defendants' Exhibit 57 for  
17 identification. Does that refresh your recollection that  
18 you asked Miss Watson to write to Mr. deGive about a  
19 company called Life Assurance of Pennsylvania?

20 A Yes.

21 Q It does so refresh your recollection?

22 A It does.

23 Q And that the reason you asked Miss Watson to  
24 so write was because a Mr. Bender had said something  
25 about the stock was going to 50?

1 [314]  
2 Q On your direct testimony, Mrs. Van Alen, you  
3 said -- correct me if I misquote you -- that you made  
4 no contribution to the transactions that were made in  
5 the custodian accounts and your account at Dominick &  
6 Dominick for the period 1953 to 1968?

7 A No contributions?

8 Q Yes.

9 A To whom?

10 Q As to stocks, when to buy, when to sell.

11 A That's correct.

12 Q So all the trading in these accounts from 1953  
13 to 1968 was done at Mr. deGive's discretion?

14 A All the trading, but go further than '68.

15 Q My question is as to 1968, and I would like you  
16 to answer that question.

17 A That's correct.

18 Q In the years from 1953 through 1968 do you  
19 contend that Mr. deGive churned your account?

20 A No.

21 Q Is it fair to say that at no time between 1953  
22 and 1968 did you ever complain to Mr. deGive or to  
23 anyone else about the way he was handling the account?

24 A I never complained about Mr. deGive until 1970.

25 Q My specific question was that you never



1  
2 complained about Mr. deGive's handling of the accounts  
3 from 1953 through 1968.

4 MR. SHAFFER: I object, your Honor. It has  
5 been answered.

6 THE COURT: No, I will allow it.

7 Q Is that correct?

8 A That is correct.

9 Q Thank you. Indeed, you thought he was handling  
10 your accounts from 1953 through 1968 very well, is that  
11 correct?

12 A Yes, that is correct.

13 Q And by "very well," you mean he made money for  
14 you, correct?

15 A Not especially. There was also the nurture.

16 THE COURT: Excuse me. During the period 1953  
17 through 1968 was it your understanding that Mr. deGive  
18 made use of his system?

19 THE WITNESS: Oh, yes. Yes, your Honor. From  
20 the beginning.

21 MR. BARIST: I would like to now offer in  
22 evidence, if I could, your Honor, Defendants' Exhibits  
23 98C and 98D, which have been stipulated to in terms of  
24 being accurate. They are the schedules showing the  
25 transactions in Mrs. Van Alen's account from 1964

1 through 1968 in the Bank of New York, because that is  
2 all we had records for, that is 98C and 98D. Defendants'  
3 98D is Mrs. Van Alen's account at Dominick & Dominick  
4 from 1953 through 1968.  
5

6 THE COURT: All right.

7 MR. SHAFFER: Your Honor, we have no objection.

8 THE COURT: Received.

9 MR. SHAFFER: There is, I would like to point  
10 out -- we will work it out between counsel -- I think  
11 there is a \$5,000 discrepancy on one schedule. But  
12 really in relationship to what is shown, it is not  
13 terribly damaging.

14 (Defendants' Exhibits 98C and 98D received  
15 in evidence.)

16 MR. SHAFFER: Your Honor does understand this  
17 is outside of the complaint or period but we have no  
18 objection.

19 MR. BARIST: Let me read to you from 98.

20 THE COURT: We will take a recess in about ten  
21 or fifteen minutes.

22 Q I won't burden you with looking at these  
23 voluminous schedules, Mrs. Van Alen, but let us turn to  
24 the year 1966-1967, where according to the schedule in  
25 evidence, 98C, Mr. deGive, in trading in your account at

XXX



1 [317]  
2 Bank of New York, made a profit of approximately  
3 \$352,000.

4 Did you complain to Mr. deGive at that time that he  
5 was making short-term profits in your account for your  
6 account in 1967?

7 A I testified I never complained about Mr. deGive.

8 Q If we can save some time, rather than go through  
9 this line by line, you never complained about any of the  
10 transactions that are shown on these schedules through  
11 the end of 1968; correct?

12 A That's correct.

13 Q Mrs. Van Alen, referring to your tax returns,  
14 were you aware in this period of time, 1963 through 1968,  
15 Mrs. Van Alen, that Mr. deGive was making short-term  
16 trades for you and taking short-term profits and short-  
17 term losses?

18 A No, I wasn't.

19 Q Did you sign your tax return?

20 A Yes.

21 MR. BARIST: Now I will offer Defendants' 64,  
22 65, 66, and 67.

23 MR. SHAFFER: I join in it, your Honor.

24 THE COURT: All right. 65, you say, 66 and 67?

25 MR. FITZPATRICK: 64 through 67.

1

2

Q Right? What did you see?

3

A I saw his black box.

4

Q With what in it?

5

A With his system in it.

6

7

Q And on that occasion did you have a discussion with Mr. deGive about what he could do with that system?

8

9

A No, not a discussion. He just stated that that --

10

Q On that occasion did Mr. deGive say anything --

11

A Yes.

12

13

Q -- with respect to what he could do with that system?

14

A Yes. He said --

15

Q What did he say?

16

17

A He said with that system that he could foretell -- he was very excited about it -- with accuracy the moves of the stock market.

18

19

Q And by moves of the stock market, what did you understand that to mean?

20

21

MR. BARIST: Objection.

22

THE COURT: Sustained.

23

MR. SHAFFER: I will leave the area, Judge.

24

25

Q On an earlier occasion did you have a similar discussion with Mr. deGive?



2 MR. BARIST: Objection.

3 THE COURT: Overruled.

4 A Many times.

5 Q Give us, as best you can, so that we can tighten  
6 up the question, a time and place when you had such a  
7 discussion.

8 A Well, he first mentioned his system in 1953  
9 when the account was opened.

10 Q What did he tell you on that occasion?

11 A He told us that he had these indicators he  
12 was working on. He kept working on them the whole time  
13 I knew him. He was always talking about what his signals  
14 were telling him.

15 Q What did he tell you that he could do with  
16 those indicators on that early occasion in 1953?

17 A He could judge whether the market was going to  
18 go up or down or the state of it. It gave him indications  
19 as to it.

20 Q Did he make any statement with respect to using  
21 the system on your account?

22 A Oh, yes.

23 Q What did he tell you?

24 A Well, that's what we were hiring, when we were  
25 hiring him, we were hiring his expertise.

[342]

Van Alen - redirect

1 [342]  
2 Q And you were hiring something besides Mr.  
3 deGive himself?

4 A Oh, of course.

5 Q What was that?

6 A Well, he was the expert.

7 Q Were you hiring anything else?

8 A His system.

9 MR. BARIST: I am going to object to that.

10 Q Thank you.

11 MR. BARIST: Your Honor, I think --

12 MR. SHAFFER: It is in the record. Do you  
13 want it stricken, Judge? I hope you don't.

14 MR. BARIST: I think at that point, your Honor,  
15 the objection was out before the witness spoke.

16 MR. SHAFFER: I agree. I agree.

17 THE COURT: I guess I am the only one who did  
18 not hear it. What is the question?

19 MR. SHAFFER: Then I am going to repeat it if I  
20 can.

21 THE COURT: What is the question?

22 MR. SHAFFER: The issue is whether or not her  
23 response to my question, "Did you hire anything else?" and  
24 she said, "Yes, his system," the question is whether that  
25 should be --



1 talking constantly, as he usually did."

2 A That's correct.

3 Q Did you give that testimony under oath in this  
4 action?  
5

6 A I agree to that testimony.

7 Q Isn't there a difference between "all set up"  
8 and "almost all set up"?  
9

10 MR. SHAFFER: Objection, your Honor;  
11 argumentative.

12 THE COURT: It is. Sustained.

13 Q Between 1953 and 1969 you knew that Mr. deGive  
14 was using this system -- let me rephrase that. I think  
15 I garbled the dates.

16 Between 1953 and the termination of your account  
17 with Mr. deGive in January or April 1970, you knew that  
18 Mr. deGive was using his system to make investment  
19 decisions in your securities accounts, is that correct?

20 A That's correct.

21 Q Do you remember if there were any years when  
22 you had net losses in the accounts which Mr. deGive  
23 handled for you prior to 1969?

24 A I don't recall.

25 Q Let me read from what is now 98D in evidence,  
which is the schedule of the Dominick & Dominick

[347]

Van Alen - recross

accounting going back to the beginning.

"1956 net loss" -- and I will round off to the nearest thousand -- "\$22,400."

THE COURT: \$2,400?

THE WITNESS: Twenty-two.

MR. BARIST: Right.

MR. SHAFFER: \$22,400.

MR. BARIST: I am sorry, \$2,400.

THE WITNESS: I thought he said twenty-two.

MR. BARIST: No, \$2,400, a 1956 loss.

Q "1960, net loss from the Dominick account, \$1,670.

"1962, net loss of \$627.

"1963, net loss of \$4,846.

"1964, in the Dominick account, net loss of \$1,800."

Let me refer now, 1968, net loss in the Dominick account, \$89,950.

Reading now from Defendants' 98C in evidence, which is the Bank of New York account for which we begin in 1964, in which there was a net profit.

1968, net loss in the Bank of New York account, \$95,000.

You knew perfectly well, did you not, that Mr. deGive's system could not guarantee that he was always going to



1  
2 make a profit? Is that correct?

3 A I knew there was no guarantee. But I had  
4 confidence in Mr. deGive.

5 MR. BARIST: No further questions of this  
6 witness, your Honor.

7 MR. SHAFFER: I am applying the scope a little,  
8 your Honor. It is getting very narrow. I am staying  
9 within it.

10 FURTHER REDIRECT EXAMINATION

11 BY MR. SHAFFER:

12 Q Mr. Barist asked you a question whether you  
13 knew during the period 1953 to 1970 that Mr. deGive was  
14 using his system.

15 A Yes.

16 Q Did you come to differentiate in your knowledge  
17 the period between 1969 and 1970 as opposed to 1953 to  
18 1968?

19 A I did.

20 Q Did you come to understand in your mind that  
21 Mr. deGive was or was not --

22 THE COURT: Don't tell her now; ask her.

23 MR. SHAFFER: Yes.

24 Q Well, what was the differentiation in your  
25 knowledge?

1 [349] Van Alen - redirect A-302  
2 A That he changed his pattern. He was going in  
3 and out.

4 Q When?

5 A Towards the end.

6 Q Which period?

7 A '69 and '70.

8 MR. SHAFFER: Thank you. Your witness.

9 MR. BARIST: No further questions.

10 THE COURT: Step down.

11 (Witness excused)

12 MR. SHAFFER: Your Honor, I have a witness that  
13 is here, and it is up to your convenience as to what you  
14 want to do. I think I will get through with the direct  
15 in ten minutes.

16 THE COURT: Fine. Why don't we proceed with  
17 him.

18 MR. SHAFFER: Mr. Shapiro, will you take the  
19 witness stand.

20 M I L T O N A. S H A P I R O, called as a  
21 witness by the plaintiff, being first duly sworn,  
22 testified as follows:

23 MR. SHAFFER: Your Honor, I would like you to  
24 be aware of the fact that this witness is going to  
25 testify about the production of Plaintiff's Exhibit No. 8,



1 income of about \$22,000?

2 A Yes.

3 Q Was the difference from trading accounts?

4 A Yes.

5 Q And that is commissions, right?

6 A That is correct.

7 Q Was that true of 1968, 1969 and 1970, that is to  
8 say, that your greater portion of income came from trading  
9 accounts and not writing the market letter?  
10

11 MR. BARIST: When he said trading accounts, I  
12 assume, your Honor, that is a colloquialism for  
13 commissions derived from accounts --

14 MR. SHAFFER: No, it is not. It is what it says.

15 MR. BARIST: I don't think the term is  
16 susceptible of meaning and I object to it.

17 THE COURT: Sustained.

18 MR. BARIST: In that case, your Honor -- never  
19 mind, your Honor.

20 MR. SHAFFER: I am going to place another  
21 question.

22 Q In 1968, when you made approximately \$100,000,  
23 and you made \$22,000 for writing the market letter, what  
24 did the difference come from? You tell me.

25 A Commissions.



1 [369] deGive - direct

2 Q Commissions for what?

3 A From the accounts.

4 Q What do you mean from the accounts? How did  
5 commissions become generated from the accounts?

6 A By the purchase and sale of securities.

7 Q So every time you purchased a security for a  
8 customer or every time you sold a security for a  
9 customer, certain commissions were generated, is that  
10 right?

11 A Yes.

12 MR. BARIST: Your Honor, we will concede this.

13 MR. SHAFFER: Fine. I accept it, but I would  
14 still like to ask the question. May I go ahead, Judge?

15 THE COURT: Yes.

16 MR. SHAFFER: Thank you.

17 Q Mr. deGive, when commissions were generated,  
18 say to the extent of \$1, from the purchase or sale of  
19 securities for customers at Dominick, who got the dollar?

20 A The commissions were charged against the  
21 account and were credited to the account of Dominick &  
22 Dominick.

23 Q That was your employer, right?

24 A Yes.

25 Q Did you receive a portion of that dollar?



1

2

A I did.

3

Q What portion did you receive?

4

A At that time, one-third.

5

Q How about in 1969?

6

A Approximately one-third.

7

Q How about in 1970?

8

MR. BARIST: Objection, your Honor. Up to

9

April 3, 1970.

10

MR. SHAFFER: I accept that, fine, Judge.

11

Q Up to April 3, if you remember.

12

A The same. One-third.

13

Q Since we will probably get a little before the

14

period, is it true from 1953 to 1970, the date that your

15

counsel mentioned, that it was one-third to you and two-

16

thirds to Dominick &amp; Dominick?

17

A Yes.

18

Q What was the market letter function that you

19

testified to?

20

A I did not hear the question, sir.

21

Q I say, what was the market letter function that

22

you testified to during the years 1953 to 1970? And, Mr.

23

deGive, to make it move along, any time I say 1970, I

24

mean until April -- 3?

25

MR. BARIST: Yes.

Q -- 1970, so that we don't go beyond that period.

THE COURT: Is that not March 3?

MR. SHAFFER: March 3, your Honor.

MR. BARIST: Actually it depends which one you want to look at. March 3 is the last transaction in Mrs. Van Alen's account. She took it away from him on April 3, 1970, and I don't think thirty days --

THE COURT: So let us take the latest, which would be April.

MR. SHAFFER: All right, your Honor. But for these purposes the last transaction date is March.

MR. BARIST: The last transaction is March.

Q We will say that it is April 3, 1970, all right, so that you understand.

A I wrote a market letter once a week for the firm and signed it.

Q Tell me, just what is a market letter?

A A market letter was an analysis of the technical material and my conclusions that I drew from it, and it was printed and distributed.

Q Generally did that letter say each week whether you should buy, whether you should sell, whether you should hold on? Some market tip, is that right?



[372]

deGive - direct

1

2

A That is correct.

3

Q And you wrote that market letter since 1953?

4

A 1949.

5

Q What was it called?

6

A "Technical Comments."

7

Q Was that a copyrighted item?

8

A I believe it was.

9

Q By you?

10

A By the firm.

11

Q Who owned the market letter, you or the firm?

12

MR. BARIST: Objection, your Honor. I fail to understand the relevance of that.

14

MR. SHAFFER: It is just general cross, Judge. I will move on if it is a problem.

16

THE COURT: You might as well answer it.

17

Q Go ahead.

18

A I wrote the market letter. It was written on Dominick & Dominick's stationery.

19

12

20

Q Who owned the copyright?

21

MR. BARIST: I also point out, your Honor, that that calls for a legal conclusion. I object to it on that ground, the question of who owns a copyright, and the copyright laws particularly with the problem of common law copyright is something that I think lawyers have

22

23

24

25

1 [373]

deGive - direct

2 difficulty with.

3 THE COURT: I will take it for his state of  
4 mind.

5 Q If you know.

6 THE COURT: State of mind. You can answer it.  
7 Go ahead.

8 MR. BARIST: If he can.

9 A I wrote the market letter and assumed it was  
10 mine.

11 Q You also mentioned that you had a consulting  
12 function for the research department.

13 A Yes.

14 Q Briefly what was that?

15 A Periodically, once a week or every two weeks,  
16 when we were reviewing investment strategy, I would meet  
17 with the investment department, or our research department.

18 Q What would you do?

19 A I would advise them as to the timing and the  
20 analysis from a technical standpoint of stocks and  
21 industries and the market.

22 Q What do you mean by timing from a technical  
23 standpoint of stocks and industries in the market? What  
24 does that mean?

25 A I based my decisions on the technical analysis



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of the market.

Q Decisions to do what?

A As to what I was thinking in the market --  
about the market.

Q What about timing? Timing to do what?

A That was part of the technical analysis.

Q Do you mean timing to make purchases and timing  
to make sales?

A Yes.

Q That is what I wanted to know.

You were also a consultant to the investors  
department?

A Investment department.

Q Investment department.

A That is correct.

Q What is the investment department?

A The investment department was a division that  
managed funds.

Q For whom?

A Individuals, and they had a mutual fund.

Q What would you advise the investment department  
on?

A On the advisability of purchasing or selling  
individual securities at various times.

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Q Would you call yourself a market forecaster?

A I would call --

THE COURT: Now?

MR. SHAFFER: No, then, in that period of time.

Q Did you understand my question?

A I did.

Q Fine. Take your time.

A No.

Q Well, what was this market letter about? Wasn't that forecasting the market? Withdrawn.

Did you in your letter say what the market had done or did you say what the market was going to do or didn't you say anything about the market?

A I talked about the advisability of buying or selling securities based on an analysis of the technical material.

Q That means, does it not, that you were forecasting what you thought the market was going to do, isn't that right?

A I was saying what I thought the market was going to do.

Q That is right. So you were forecasting what you thought the market was going to do?

MR. BARIST: Objection, your Honor; asked and



1 answered, and it is argumentative.

2  
3 MR. SHAFFER: I don't think so, Judge.

4 THE COURT: I will sustain the objection.

5 Q Mr. deGive, did you believe your technical  
6 materials as analyzed by you put you in a position to  
7 foretell what the market was going to do? Yes or no.

8 MR. BARIST: I don't believe that question can  
9 be answered yes or no, your Honor.

10 MR. SHAFFER: If it cannot, I withdraw the  
11 limitation.

12 Q Answer it any way you think you can.

13 A I believe that after years of analyzing and  
14 working with technical material that it had a good record  
15 and that the odds were in favor of the technical material  
16 anticipating what the market was going to do.

17 Q Were your opinions on the average in the year  
18 1953 to 1957 more right than wrong?

19 A More right.

20 Q Did that, in that period of time, did you  
21 generally forecast long-term gains in the market or long-  
22 term rise in the market?

23 MR. BARIST: Your Honor, I am continuing to have  
24 problems with this word "forecast," which I don't think is  
25 susceptible of a single meaning in this context, and I

Twenties in years, Mr. Shaffer?

MR. SHAFFER: It is the witness, I took it to be years.

Q Is it years?

THE COURT: You mean 1920's?

THE WITNESS: No.

Q It reached a peak in numbers, in the twenties?

A Reached a peak in numbers as being in the twenties.

Q Mr. deGive, did you ever describe yourself as a chartist?

A Yes.

Q Tell his Honor what a chartist does. I know his Honor knows this, but I want to get it into the record.

A A chartist is, in my definition, a chartist is a man who makes certain calculations based on the technical analysis of the market and putting them on charts.

Q Now --

A Putting that information or calculations on charts.

Q Could you further describe your calculations and the charting of those calculations with respect to any relationship between capital flowing in and out of



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the market?

A Yes.

Q Why don't you give us the standard definition that you had given in the past in pretrial deposition in this case?

MR. BARIST: I object to that question, your Honor, in that form.

THE COURT: Sustained.

Q Why don't you give any definition that comes to your mind?

MR. BARIST: I object to the question in that form, your Honor.

THE COURT: Sustained.

Q Why don't you give a definition?

MR. SHAFFER: Is that all right?

MR. BARIST: Yes.

MR. SHAFFER: Thank you.

Q Why don't you give a definition?

A Technical analysis is based on calculating the flow of money into the stock market and flow of money going out of the stock market, and comparing the two.

Q So it is just a cash flow compared, in and out?

A Yes.

Q Is the cash flow ever compared to the value of

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the securities being offered or is that the same thing?

A It is not.

Q It is not the same thing or it is not compared by a chartist?

A It is not the same thing.

Q Is it compared by a chartist?

A No.

Q And then when you make these comparisons of cash flow in and out, you write them down, is that right, you plot them?

A Yes.

Q And that creates the chart?

A Yes.

Q And you do something further with that information other than putting it on a chart, don't you? You put it into certain moving averages?

A Yes. Before I put them on the charts.

Q Would you explain that a little bit for his Honor and the record.

A My system has a series of moving averages. A seven-day moving average, which is: Each day I take the total number of issues that advance and divide it by the total number of issues traded that day. I get a percent. I take seven days of that and divide it by seven to



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get a moving average.

Q You do that on Tuesday?

A I do that --

Q Let us just say you do that on a Tuesday, or any day of the week.

THE COURT: Did you say you get a moving average?

MR. SHAFFER: Yes.

THE WITNESS: Yes.

MR. BARIST: Your Honor --

THE WITNESS: The moving average --

MR. BARIST: Excuse me. I was going to say Mr. Shaffer I thought interrupted the witness before he finished.

MR. SHAFFER: I did, and I apologize and I will try not to do it again.

THE WITNESS: I call it a moving average, your Honor, because each day you take the first day's figures off the seven-day moving average and add on the new figure, to make a seven-day total, and then divide it by seven.

Q So each day there is a different seven-day period by one new day and the loss of one day?

A Yes.

1 [384] deGive - direct  
2 Q And the days that you use, of course, are only  
3 market days?

4 A Yes, sir.

5 MR. BARIST: Excuse me, your Honor. I thought  
6 that the question which was answered by the seven-day  
7 testimony asked for all the averages in Mr. deGive's  
8 system.

9 MR. SHAFFER: We are doing it one by one, your  
10 Honor, and I would respectfully suggest, if I may, that  
11 maybe Mr. Barist keep some notes and he come back on  
12 redirect if there is something that I don't do the way  
13 he wants it done.

14 MR. BARIST: I think that the witness has the  
15 right to answer the question fully.

16 THE COURT: Let us move along.

17 Q Mr. Witness, bearing in mind that you talked  
18 about a seven-day moving average, do you also in your  
19 system have a moving average for a longer period of time?

20 A Yes.

21 Q Would ten days be one of those longer periods  
22 of time?

23 A Yes.

24 Q Would the system you described to his Honor with  
25 respect to the ten-day period be similar to the seven



except you would be dividing by ten?

A No.

Q Tell the difference.

A For the ten-day moving average, to compute that, I take the total number of declines on a particular day and divide it by the total number of issues traded in the stock exchange for that day. I get a percent figure. I then take ten days of those percent figures, divide it by ten, and I get a moving average.

Q Then you drop one and add one each day?

A That is correct.

Q So that between the seven and the ten, so that we understand it, there are different formulas?

A Yes.

Q There are also different periods?

A Yes.

Q But otherwise the mechanics are the same?

A Yes.

Q Then do you have a twelve-day average in your system?

A I do.

Q So that we understand one another and the record will be clear, this is the system that you employed during the period 1953 through 1970, with minor changes which you



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can explain as you go along.

MR. BARIST: Objection to the last part of the question, your Honor.

MR. SHAFFER: All right, I will take the last part out. I was trying to leave the witness room, your Honor.

Q Is it the system that you used from 1953, say, through 1968?

A With more moving averages.

Q Yes, all right. Is it the same system that you used from 1968 to the date in 1970 that we have agreed upon?

A Yes.

Q In this twelve-day moving average, what is your formula?

A My formula is to take twelve days of number of issues, of the number of shares traded on stocks that end up a particular day.

Q And by up, you mean a plus?

A Plus. And divide it by the number of shares traded in stocks that end down for that particular day, the number of shares or volume. I guess a percent. I get a ratio on that, and I take twelve days of that, and I have a twelve-day moving average.



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Q Then you do the same thing each new day?

A That is correct.

Q Then you add an eighteen day?

A Yes.

Q What was the eighteen-day formula?

A One eighteen-day index was taking eighteen days total of all the advances in the market, that is, the number of advances each day for eighteen days, and adding them together. And each day subtracting the first day of the eighteen day and adding a new day.

Q You say that was one of the eighteen-day indexes?

A That is correct.

Q Which one was that, the buyer or the seller?

A That was a buying index.

Q A buying index.

A Or money flowing into the market.

Q Would that be a buying-power line?

A Yes.

Q As depicted on a graph?

A That is correct.

Q What was another eighteen-day indicator?

A The other eighteen-day indicator was taking eighteen days of the daily number of declines, taking eighteen days total, and each day taking off the first

1 day and adding the new day. That was a selling index.

2 Q I think you also had a thirty day?

3 A That is correct.

4 Q Were there any in between that I did not know  
5 about, eighteen to thirty, or did you go from eighteen to  
6 thirty?  
7

8 A I went from eighteen to thirty.

9 Q What was the thirty day?

10 A The thirty days was thirty days of volume of  
11 stocks ending up divided by volume of stocks ending down,  
12 each day. Thirty-day totals. A ratio.

13 Q And you would add to that and subtract by adding --

14 A The same way. Each day I would subtract the  
15 first day of the thirty day and then add the new one.

16 Q So his Honor and the record understand this,  
17 that is equivalent to six weeks layman's time, isn't it,  
18 in some instances?

19 A Assuming five trading days a week, that is six  
20 weeks.

21 Q And you sometimes referred to it as a six-week  
22 indicator?

23 A Yes.

24 Q Then after the thirty days we have -- what is  
25 the next longer indicator?



1 [389] deGive - direct A-321  
2 A Fifty-five to sixty days.

3 Q How many indicators of that length do you have  
4 in your system?

5 A Two indicators.

6 Q A buy and a sell?

7 A Yes.

8 Q What was the buy?

9 A The buying was a series of moving averages  
10 computed by using volume of stocks advancing divided by --  
11 or related to points gained in a series of indexes and  
12 moving averages.

13 Q Have you completed your answer?

14 A That was the buying index.

15 Q Yes. Have you completed that answer?

16 A Yes.

17 Q Now tell his Honor what you mean by points  
18 gained and how it would work in working out the formula.  
19 Would you take all the stocks that advanced, find out the  
20 number of issues, multiply the issues by the price rise  
21 per issue, and then do something with that figure? How  
22 would you do that?

23 A I did not know the exact method of putting that  
24 formula together.

25 Q Oh, you did not.

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A No.

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Q What did you do, buy that formula from somebody  
else?

5

A Yes.

6

7

Q Who sold you that formula? Who sold you that  
formula?

8

9

10

MR. BARIST: Excuse me, your Honor. I think I  
will object to the way that question is phrased. I object  
to the form of that question.

11

THE COURT: Overruled.

12

Q Who sold you the formula?

13

A I don't understand that question, your Honor.

14

Q Well, you did not have that formula, did you?

15

A No.

16

Q You bought it from somebody, didn't you?

17

A Yes.

18

Q Who sold it to you?

19

20

MR. BARIST: Can we identify which formula we  
are now talking about.

21

22

MR. SHAFFER: The one that he just mentioned,  
your Honor. It is in your notes.

23

24

THE COURT: This is fifty-five sixty days, as I  
understand.

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MR. SHAFFER: That is right.



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THE WITNESS: That is correct.

Q Who sold you the formula?

A There was a service that sold the formula and I bought it.

Q What was the name of the service?

A Lowry's Service.

Q Lowry's, right?

A Yes.

Q L-o-w-r-y's?

A I believe that is the way you spell it.

Q Was there a man named Lowry?

A Yes.

Q Did you ever meet him?

A On a number of occasions.

Q How often did Mr. Lowry send you that information?

A There was daily information and weekly information.

Q Did you get it daily?

A Yes.

Q Did you get it weekly?

A Yes.

Q Did you get it during the entire period that we are talking about, from 1953 to that date in April of 1970 when -- you know, we don't talk past that day.

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A Yes.

Q And daily did you get the information by telephone?

A By telephone or through the mail.

Q Was there a longer period than the sixty-day information that you have just described as being fifty-five to sixty days?

A There was another fifty fifty-five day index.

Q Was that a selling index?

A Yes.

Q How was that computation worked out?

A As I understand, but in a series of moving averages making computations based on points gained in volume and points lost in volume related to it, an index of percentages and ratios were calculated.

Q Was the source the same?

A Yes.

Q Mr. Lowry.

A That is correct.

Q And you got, if you bought the buy indicator, you got the sell too, didn't you? I mean he did not sell them separately?

A No, no.

Q So if you got the information in the mail, you



1 [393] deGive - direct  
2 got the requisite input to the formula on both power  
3 lines; is that right?

4 A Yes.

5 Q And one could be said to be a buying-power line  
6 and one could be said to be a selling-power line?

7 A That's correct.

8 Q Then wasn't there a six-month moving average?

9 A Not strictly.

10 Q What was the next longer holding average that  
11 you utilized in your system?

12 A I used a periodic comparison of the fifty-five  
13 sixty day moving average by looking at it from time to  
14 time over a 120-day period.

15 Q And that would be again 120 market days?

16 A That is correct.

17 Q And that is roughly equivalent, is it not, by  
18 converting the thirty days to six weeks, 120 days to six  
19 months, isn't it? Is it six months?

20 A No.

21 Q Three months?

22 A 120 days?

23 Q Yes. It would be six months, wouldn't it?

24 A Six months.

25 Q Roughly. I think you have referred to it in

the past as a six-month one.

A Yes.

Q Because 120 days strictly is four months with thirty days to the month and you have two months with Saturdays and Sundays.

A Yes.

Q Will you accept that?

A Yes.

Q Was there any other longer period that was utilized by you in the daily operation of your system?

A Yes.

Q What was that longer period?

A I made calculations, other calculations.

Q Let me put it to you this way: Was there any moving average?

A Yes.

Q That was longer than six months or 120 days?

A No, not longer.

Q So that was the longest period that was converted into a moving average on a daily basis.

A Yes.

Q After you made all these computations or consulted other sources, what would you do with these figures by way of recording them?



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A I would put them on charts.

Q You would put them on charts. Would you represent them on charts in the form of figures or would you represent them on a chart in some other way?

A In the form of lines.

Q When you say lines, we kind of get the idea that they are straight lines, at least laymen do. Were these straight lines?

A No.

Q These were what kind of lines?

A They were lines that moved up and down.

Q Did you have another term for those lines that moved up and down?

A Impulses.

Q Did you have any other term than that?

A Or thrusts.

Q Any other term than that?

A Levels.

Q Any other term than that?

A Degrees of strength or weakness.

Q How about oscillators?

A What's that?

Q How about oscillators?

A Yes, I did.

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A Yes.

Q And by a comparison of the top points or the bottom points, you would make certain determinations as far as your conclusion was concerned with respect to that oscillator.

A That is correct.

Q These various matters that we have discussed would give you various indicators of the future trend of the market, isn't that so, over given periods of time?

A Yes.

Q And based upon those indicators you would make judgments?

A Yes.

Q You would form opinions?

A Yes.

Q And you would record those opinions in your market letter?

A Yes.

Q And you would advise people to buy or sell, depending on what their investment purpose was, isn't that so?

A I would write a market letter and I would recommend or advise or suggest the trend of the market.

Q Yes. But now on particular customers you would



1  
2 advise them too based on all this information, wouldn't  
3 you?

4 A Yes.

5 Q If a man came to you and said he wanted to sell  
6 short, you would tell him when the time was you thought  
7 to sell short?

8 A Yes.

9 Q Or to buy long?

10 A Yes.

11 Q Did you have an account for yourself?

12 A Not a large one.

13 Q I did not ask you that. I just wanted to know:  
14 Did you have an account for yourself?

15 A From time to time I had some funds.

16 Q Did you make a lot of money on it?

17 A It was not a large account.

18 Q I did not ask that. I want to know, did you make  
19 a lot of money in that account?

20 MR. BARIST: I think he answered that by saying  
21 it was not a large account.

22 MR. SHAFFER: Well, that is different, Judge.

23 THE COURT: I will allow the answer. Go ahead.

24 Q What is your answer, sir?

25 A From time to time I made money.

advancing or declining --

THE COURT: Had been behind?

THE WITNESS: Or with the market or better than the market.

Q And that "had been" period was a reasonably relevant period in the recent past, is that right?

A Yes.

Q Approximately how long? Six months, three months, a year?

A Anywhere from six weeks to six months.

Q Would you, in finding investment vehicles for those for whom you employed your system, select a cross-section from those three categories?

A Yes.

Q Would it be weighted with respect to any one of those three categories?

A Not necessarily.

Q Did there come a time when you met Candace Van Alen?

A Yes.

Q When was that?

A 1953.

Q How did you come to meet her?

A I was introduced to her.



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Q By whom?

A Her husband, Mr. James Van Alen.

Q Whom you had known before?

A He had been a close friend of my brother's.

Q How long had you known Mr. James Van Alen in that capacity?

A A number of years.

Q Had you known him socially?

A Yes.

Q Did you know the first Mrs. Van Alen?

A Yes.

Q Where did you meet my client for the first time, if you recall?

A I don't recall.

Q Did there come a time when you met in her home to discuss the possibility or the prospect of your doing some brokerage work for her?

A Yes. It could have been there or somewhere else. I met her.

Q You met her. Do you recall that it was in her home in Millbrook?

THE COURT: Millbrook?

MR. SHAFFER: Millbrook, New York, your Honor, M-i-l-l-b-r-o-o-k.



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A It could have been, but I recall meeting her.

Q Who was present to meet you?

A Mr. and Mrs. Van Alen.

Q Anybody else?

A I don't recall.

Q Did the account at the Empire Trust Company, the custodian account, come up in that conversation? That she had an account at the Empire Trust Company and that she wanted you to have some connection with that account?

A Yes.

Q In this meeting, wherever it was, do you recall something coming up about she wanted to have an account like the one you said you had for your mother? Was there any kind of words like that?

A I recall Mrs. Van Alen said, "Take care of this the way you would a member of your family."

Q Did you remember telling her that you had an account for your mother that you took care of?

A No, I do not.

Q Did you take care of an account for your mother?

A No.

Q Did you take care of any account for any member of your family at that time?

A Yes.



1 [412] deGive - direct  
2 Q Did you have discretionary authority over your  
3 family members' accounts or some of them?

4 A Yes.

5 Q Did you understand in this conversation that  
6 Mrs. Van Alen wanted you to have discretion, a discretionary  
7 power, in the exercise of purchases and sales of her  
8 account?

9 A Where?

10 Q The only one we have discussed, the Empire  
11 Trust Company.

12 A Yes, I did.

13 Q Where? Was there ever any account she had that  
14 you did not have any discretionary authority over, wherever  
15 it was?

16 MR. BARIST: Objection.

17 MR. SHAFFER: Why, Judge?

18 THE COURT: We won't get into that. Next  
19 question.

20 Q Empire Trust, we have established that.

21 A Yes.

22 Q Was such an account opened, a discretionary  
23 power account where you had discretionary power in a  
24 custody account at the Empire Trust Company in 1953?

25 A To the best of my recollection, the account



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deGive - direct

was opened, she gave me discretionary power at that time.

Q Yes.

A OK.

Q That is what I am trying to say. Was that in April as the documents have shown in this case up to now?

A It could have been.

Q Do you remember approximately how much was in the account at the time you got the power to exercise discretionary purchases and sales?

A To the best of my recollection, it was around -- it was less than a hundred thousand dollars.

Q At this time did Mrs. Van Alen give you any personal objectives that she had in mind with respect to the account?

A She told me some things.

Q What did she tell you?

A She said, "Paul, this is all I have. Take care of it and try to make it grow."

Q Did she tell you that she was going to need money in her old age?

A No.

Q Did she tell you that Mr. Van Alen was a life tenant on some trusts of family members and that upon his death she would not see any part of those trusts, that



MR. SHAFFER: What is wrong with the form?

I think it is all right.

THE COURT: It might not have been necessary to add all that, but there is nothing wrong with the question. The witness has said that is what the plaintiff said she assigned as the reason for opening it. Go ahead.

MR. BARIST: But I don't think the witness said that she wanted to give you the money.

MR. SHAFFER: Oh, all right. I accept that, Judge, and I will try to keep it down.

Q Mr. deGive, how much money did Mrs. Van Alen want to put in the Dominick & Dominick account?

A To the best of my recollection, she opened the account with about \$28,000.

Q Do you remember where that money came from, other than her pocket?

A No.

THE COURT: Other than what?

MR. SHAFFER: Her pocket.

THE COURT: All right.

A No.

Q No?

A No.

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Q Does Baker Hardin Weeks mean anything to you?

A Yes.

Q Did she have that money and was it transferred?

A Some of it could have been.

Q When did you first learn she had the Baker Hardin Weeks account?

MR. BARIST: Objection.

MR. SHAFFER: I want to find out when --

THE COURT: When did you first hear of the Baker account in relation to the plaintiff?

THE WITNESS: I believe she told me she had some securities at Baker Weeks and she was going to give instructions to transfer them over.

Q Did she tell you that the first time you met her?

A I don't recall.

Q Could it have been?

A It could have been.

Q And it was understood, was it not, Mr. deGive, that in this new account you would get a similar discretionary power?

A Yes.

Q Now I want to show you what has been received in evidence as Plaintiff's Exhibit No. 28 and ask you, do you recognize that as a Dominick & Dominick form -- of



course it is a copy, you understand.

A Yes, I recognize it.

Q Did you prepare it?

THE COURT: It is in evidence. That is Plaintiff's 28 in evidence?

MR. SHAFFER: Yes, it is, your Honor.

MR. BARIST: Yes.

A I or my secretary.

Q Did you supervise its preparation?

A Yes.

Q Is that your signature?

A No.

MR. BARIST: Where is the signature?

MR. SHAFFER: I asked, is it? There is only one signature on the front page and he says it is not his.

Q Do you know whose signature that is?

A Yes.

Q Whose is it?

A It reads to me, Gardner D. Stout.

Q And who was Gardner D. Stout in 1953?

A He was the managing partner of Dominick -- a managing partner of Dominick & Dominick partnership.

Q I see on here that there is a place called "sign customer's agreement," and there is an X. Do you

1  
2 see that?

3 A Yes.

4 Q Do you know what that has reference to?

5 A It has reference to a margin agreement.

6 Q In 1953?

7 MR. BARIST: No, sir, that is --

8 MR. SHAFFER: No, Mr. Barist, there is no call on  
9 you to say anything.

10 Mr. Barist is talking to the witness, Judge.

11 THE COURT: What is the outstanding question?

12 MR. BARIST: I would like to have the question  
13 rephrased.

14 MR. SHAFFER: I don't want to rephrase it, Judge.  
15 I like it the way it is.

16 MR. BARIST: But in 1953 --

17 THE COURT: Read back the last few questions  
18 and answers, please.

19 (Record read)

20 THE COURT: Sustained as to form. Next question.

21 Q Was there a margin agreement in 1953, Mr. deGive?

22 A No.

23 Q So it does not have reference to the margin  
24 agreement, then, does it?

25 MR. BARIST: Objection, your Honor. That is not



what the witness has testified to.

THE COURT: Overruled. You may answer.

Q Answer the question, please, Mr. deGive.

A Would you ask to repeat the question?

Q Yes, I think I can do it more quickly than have the reporter do it.

I said in 1953 was there a margin agreement and you said no, right?

A "No."

Q So then that X next to the signed customer's agreement does not have reference to a margin agreement, does it?

A Yes.

Q But there was no margin agreement.

MR. BARIST: Objection, your Honor.

THE COURT: Overruled.

MR. BARIST: As of what point in time was there no margin agreement?, I think the question should include, your Honor.

THE COURT: You see, as you know, counselor, you are not going to get, every time a question is put to the witness, a total perfect answer. It has to be developed. Give counsel a chance to develop at least a chunk of whatever it is he is inquiring about.

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Go ahead, please.

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MR. SHAFFER: Thank you.

4

5

Q Mr. deGive, when was the X put on there, in 1953 or at a later time?

6

A I don't know.

7

8

Q Was the X on there in 1953 when you saw the form, if you remember?

9

THE COURT: Is that 28 you are looking at?

10

MR. SHAFFER: Yes, your Honor.

11

A No.

12

THE COURT: No, it was not?

13

THE WITNESS: No, it was not.

14

Q Do you know when it was put on there?

15

16

A Looking at the card, I would say it was put on there May 16, 1953.

17

18

Q And was that the time that a margin agreement was entered into with Mrs. Van Alen, between Dominick & --

19

A To the best of my recollection.

20

21

22

Q So that is a kind of living card that goes through the history of the account and from time to time various notations are added to it?

23

A Yes.

24

25

Q In 1953 I take it that the signed trading authority limited with a box or complete with a box was



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on the form, obviously.

A Yes.

Q And I don't see any mark in either box. Is that your visual observation?

A Yes.

Q Should one of those boxes have been marked, in view of the discretionary power you enjoyed in the trading of this account from the beginning?

A That would have been the normal practice.

Q And in view of the trading power you had, which box would it have been the normal practice to mark?

A Signed trading authority limited.

Q What would a mark in the complete box mean?

A Power to withdraw funds.

Q From the account?

A Among other things.

Q In other words, treating it as your own, is that right? I don't mean that you could misuse money, but I mean you could draw money out of an account just like you could out of your own personal account, among other things.

A Yes.

Q And you never had such power over Mrs. Van Alen's account?

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A No.

Q And you never exercised such power over Mrs.  
Van Alen's account?

A No.

Q Did you make any additions to that form in 1963,  
on the back? Is any of that your handwriting?

A Yes.

Q Which part is your handwriting?

A Retain all cash and securities except income, and  
permit that quarter March 31, June 30, September 30 and  
December 26.

Q When was that put on, do you know?

A No.

Q But it was before 4/9/62, do you believe?

A I don't know.

Q I am asking you, do you believe it?

MR. BARIST: I object to the form of the question.

THE COURT: Sustained.

14 Q Is it true that what you have just read is above  
an entry that is next to a date 4/9/62?

MR. BARIST: I object to the form -- withdraw  
that. We will so concede that it so appears on the card,  
your Honor, but I don't see the purpose of examining the  
witness on the placement on the card.



1 [432] deGive - direct A-343  
2 THE COURT: Conceded that that is where it  
3 appears.

4 Q Does that lead you to believe -- your counsel  
5 has conceded that -- that what you have read as being your  
6 handwriting was put on there before 4/9/62, because it is  
7 above it?

8 MR. SHAFFER: Your Honor, I assume I have your  
9 permission to be near the witness just while I am looking  
10 at this form.

11 THE COURT: All right.

12 MR. BARIST: Your Honor, I will be happy to give  
13 Mr. Shaffer an extra copy of the card. I get a little  
14 nervous at that.

15 MR. SHAFFER: All right. I don't want to make  
16 anybody nervous.

17 Thank you, Mr. Barist.

18 THE COURT: Can you answer the outstanding  
19 question, Mr. deGive?

20 A Well, it comes before the other date, yes.

21 Q I just want to know: Does that lead you or  
22 prompt you to a belief that you put it on there before  
23 4/9/62?

24 MR. BARIST: Your Honor, I object to the form.  
25 Isn't the question, does it refresh his recollection?

1 [433] MR. SHAFFER: No, I don't think so.

2  
3 THE COURT: I am interpreting the question,  
4 I guess we had better make sure the witness is too, as  
5 addressing what was customary in connection with such  
6 record-keeping at the Dominick firm.

7 MR. SHAFFER: Right. By this witness because  
8 it is his handwriting.

9 THE COURT: And in light of the fact it is in  
10 his handwriting.

11 MR. SHAFFER: Right.

12 A It is my handwriting and I put it on there. I  
13 don't recall, remember when I put it on.

14 Q Fine. We will go to the next question. Thank  
15 you.

16 Do you think, from looking at it, that it was not  
17 put on there in 1953?

18 MR. BARIST: Objection, your Honor, to the form.

19 THE COURT: Are you able to answer that?

20 THE WITNESS: Do I think that it was not put  
21 on there in '63?

22 THE COURT: Right.

23 MR. SHAFFER: I will withdraw it and ask it in  
24 another way.

25 Q Did you put material on the back of that form



1 when you first saw the front of the form? That is all I  
2 want to know, if you know.

3  
4 A I would have to put material on the back of  
5 that form in this respect some time around when the  
6 account was opened.

7 Q All right, that is good enough.

8 A Normally.

9 Q Fair enough. Look at the front of the form,  
10 please. Do you see that it says Newport, Rhode Island,  
11 and it says Millbrook, New York; is that correct?

12 A Yes.

13 Q Is it a fact that in 1953 there was no Newport,  
14 Rhode Island, address applicable to Mrs. Van Alen, or am  
15 I wrong on that?

16 A I can't answer that question. I don't know.

17 Q Certainly it was crossed out, wasn't it?

18 A Newport, Rhode Island.

19 Q And Millbrook is crossed out too, isn't it?

20 A Yes.

21 Q And now there is over on the right, 6/11/54,  
22 we have Avalon, Newport, Rhode Island, and the extant  
23 address.

24 A Yes.

25 Q Then we have a zip code there, 02840, which was



put in whenever zip codes came in through the great federal post offices.

A Yes.

Q I want to show you a customer's agreement --

THE COURT: Before you do, I think we will interrupt here and take about fifteen minutes.

(Recess)

Q Mr. deGive, before the break I was going to ask you about Plaintiff's Exhibit 29 in evidence, which is a customer's agreement that I think relates to the margin account which I believe the testimony shows was opened in 1963. Is that your understanding of the facts?

A Yes.

Q Was there some kind of customer's agreement at the time that the account was opened at Dominick & Dominick in 1953, based upon the usual practice of Dominick & Dominick with respect to a customer's account like Mrs. Van Alen's in which the broker had discretionary power?

A No. I don't think so.

Q Let us go back to 1953. Would there have been a recitation of your power?

A A what?

Q Recitation, written recitation of the fact that you had discretionary authority to trade the account.



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A It would have been a signed power.

Q A signed power.

MR. SHAFFER: Do you have that?

MR. BARIST: No.

Q Are you aware of having seen that during the preparation of this case, the signed power?

A No.

Q Is it your understanding that that signed power did at one time exist?

A Yes.

Q Is it your understanding that it has been mislaid and therefore is not available today? By mislaid, I mean just has not surfaced, can't be found.

A Yes.

Q Do you know whether or not that signed power that is related to the 1953 transaction whereby you acquired discretionary power over my client's account at the Dominick & Dominick securities account in 1953 would have contained language similar to paragraph 2?

A I am not sure whether it would.

Q Would there have been any reference in that power to the fact that the account would be run in accordance with the rules then in force, promulgated by the New York Stock Exchange?



1 [437] deGive - direct A-348  
2 A I would have to refresh my memory on that.

3 Q I wish I could help you, but I have no document  
4 to show you.

5 Let me ask you this: Was it your intention in 1953,  
6 when you opened this account, to run the account in  
7 accordance with the written power given you by my client  
8 and also the rules of the New York Stock Exchange?

9 A Yes.

10 Q Would that have been told to my client in the  
11 ordinary course of conversation in opening an account?

12 A It might have been an accepted fact or  
13 accepted knowledge.

14 Q An understood fact?

15 A Yes.

16 Q As a fact you were required -- you have a  
17 registration as a customer's man or broker or whatever  
18 term I should apply to you?

19 A Yes, sir.

20 Q What term is it that I should apply to you and  
21 I will apply it?

22 A It is the customer's representative.

23 Q Customer's representative. Are you registered  
24 anywhere as a customer's representative?

25 A Yes.



1

2

Q Where are you registered?

3

A New York Stock Exchange.

4

5

Q Is that a requirement that you be so registered before you act in that capacity?

6

A Yes.

7

THE COURT: Registered representative.

8

THE WITNESS: That is correct.

9

10

Q Do you take examinations and pass certain

qualifications in order to be so registered?

11

A I took an exam.

12

Q And is it the practice of everyone to --

13

A Yes.

14

Q -- take an exam before they can be so registered?

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A Yes.

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Q In 1953, there at Millbrook, during the conversation relating to the Empire Trust Company account, if the conversation was at Millbrook, or wherever it was, and subsequently when Mrs. Van Alen told you in July that she had \$28,000, plus or minus, that she wanted to invest and keep separate in an account at Dominick & Dominick over which you were to have discretionary power, was there any conversation about the fact that the account would be run in accordance with the rules?

A It was an accepted fact it would be run in



1  
2 accordance with the rules.

3 Q Was there any expression of that accepted  
4 fact, if you recall?

5 A Not in a direct way, no.

6 Q Was there anything you did calculated to lead my  
7 client to believe that the account would not be run in  
8 accordance with the rules?

9 A No. No. Excuse me. You want me to be louder?

10 Q The second time was loud enough.

11 A What?

12 Q I say your second statement was loud enough.  
13 Did there come a time in the relationship with  
14 Mrs. Van Alen when a third account was opened? Maybe I  
15 can clear that up.

16 Did there come a time when the custody account at  
17 the Empire Trust Company no longer was maintained at the  
18 Bank of New York, which was a successor to the Empire  
19 Trust Company?

20 A Yes.

21 Q And when the changeover from the Empire Trust  
22 Company went to the Bank of New York, there was no new  
23 paper requirements, because that was just a matter of  
24 the Bank of New York becoming the successor to the Empire  
25 Trust, and whatever was at the Empire Trust became at



1 the Bank of New York, isn't that so?

2 A I assume so, yes.

3 Q There did come a time, though, in 1969, when the  
4 Bank of New York was closed, that account, and it was  
5 opened to the First National City Bank.  
6

7 A Yes.

8 Q Just to cover all the bases, you did have  
9 discretionary authority at the Bank of New York, as you  
10 did have at the Empire Trust Company?

11 A Yes.

12 Q When the new account was opened at the First  
13 National City Bank, you continued discretionary authority  
14 over the same funds which had theretofore been at the  
15 Bank of New York?

16 A Yes.

17 Q Was there any documentation of that power that  
18 you had at the First National City Bank?

19 A I was told so.

20 Q Did you ever see it?

21 A No.

22 Q You exercised discretionary authority many times  
23 in that account, did you not?

24 A Yes.

25 Q And your discretion was never questioned at

THE COURT: Just a moment, please.

Change the form, please. Were you an investment advisor during that period to Mrs. Van Alen?

THE WITNESS: I advised Mrs. Van Alen on investments during that period.

Q Had you made investment advice to others during that period?

A Yes.

Q And you treated Mrs. Van Alen as one of the persons whom you gave investment advice in a professional way during the period involved?

A Yes.

Q And Mrs. Van Alen accepted that investment advice, as far as you know, on most occasions?

A Yes.

Q And you would on occasion make transactions or initiate transactions in her accounts without first speaking to her? On occasions, I say.

A On occasions.

Q And you had that power?

A Yes.

Q You were comfortable in the exercise of it?

MR. BARIST: Objection.

THE COURT: Sustained.



MR. SHAFFER: Sustained.

Q And the transactions you initiated were both buys and sells?

A Yes.

Q Did you ever tell Mrs. Van Alen about your sister?

A On more than one occasion.

Q When was the first occasion you talked to Mrs. Van Alen about your sister?

A 1953.

Q Was that the first time that you were discussing the Empire Trust account?

A At or about that time.

Q You were writing the market letter then, weren't you?

A Yes.

Q You were known then in the trade as a man with a system, weren't you?

MR. BARIST: Objection, your Honor.

MR. SHAFFER: Colloquialism, Judge.

THE COURT: I will allow it.

MR. BARIST: Your Honor, it is asking him to testify as to how he was known in the trade. I don't think he can testify as to anyone else's mind.

MR. SHAFFER: Oh, Judge, I think we can all --

THE COURT: He is in the field. He may know what his reputation was. Given the limitations of that, you may answer.

Q You were known as a man with a system, weren't you?

A I was known as a market letter writer named Paul deGive who used technical material.

Q You were known as a chartist?

A Could be quoted as such.

Q Is it fair to say chartists are a certain group within Wall Street?

A A group, yes.

Q I suppose each chartist has his own system, based upon your experience, isn't that so?

A I am not too familiar with other chartists.

Q Did you ever find out that any other chartist had your system?

A No.

Q Did you ever find out that you had anybody else's system?

MR. BARIST: Could we have that narrowed down to the period of the complaint?

THE COURT: Yes.



1 [451] deGive - direct A-355  
2 MR. SHAFFER: How about 1953 to 1970 first,  
3 Judge?

4 MR. BARIST: 1953 to 1970.

5 MR. SHAFFER: Is that all right?

6 MR. BARIST: Fine.

7 THE WITNESS: Now would you repeat that  
8 question?

9 (Question read)

10 Q During the period 1953 to 1970.

11 A No.

12 THE COURT: Was Lowry's a chartist? Lowry,  
13 rather.

14 A It's described as a chart service, I believe,  
15 your Honor.

16 Q Based upon what you know of Mr. Lowry and his  
17 system, even though it is secret, was he a chartist?

18 A I prefer to call him a technical analyst.

19 Q You prefer to call yourself a technical  
20 analyst?

21 A Or a technician.

22 Q How about yourself?

23 A Same thing.

24 Q I understand. Understanding your preference,  
25 chartist is a well-known definition within the community

in which you operate, isn't that so?

A Well, sometimes the phrase "technician" is used.

Q I just want to use "chartist."

A OK.

Q Mr. Barist on redirect can use technician and I won't object. All right?

Were you known as a chartist in that period?

THE COURT: I think he has indicated yes.

MR. SHAFFER: I am getting to Lowry, Judge.

Q Is Lowry a chartist?

MR. BARIST: The question has been asked and answered.

THE COURT: He said yes to that too.

MR. SHAFFER: All right, fine.

Q Back in 1953 did you show my client your charts?

A In 1953?

Q Yes.

A I don't remember.

Q What did you tell her in 1953, that you recall, about your system?

A I told her that I based my decisions on the market on a technical analysis and that I did a number of calculations and kept charts.



Q Did you tell her that you believed you could predict market movements in advance of their occurrence?

A I said the technical analysis had had a good record over a period of years of anticipating or predicting market movements.

Q Did you tell her you would apply this system that you had to her account, the 1953 account at Empire Trust Company?

A I told her I would base my decisions on that material and --

Q Act.

A -- act on her behalf.

Q What?

A On her behalf.

Q Did you tell her that with respect to the Dominick & Dominick account that was opened in July of 1953 when she gave you that separate account she did not want commingled?

A Yes.

Q When you went to the First National City Bank for a loan, from the Bank of New York, did you tell her you were going to apply that system to those transactions in the First National City Bank or was that understood?

A Understood.

1 in light of the initial instructions she gave you in  
2 1953 as to what her investment purpose was?

3 MR. BARIST: Objection, your Honor.

4 THE COURT: No, I will allow it.

5 MR. SHAFFER: Thank you, Judge.

6 THE COURT: Answer?

7  
8 A I did not consider Mrs. Van Alen in that light,  
9 whether she was a trader or not a trader. I considered,  
10 when I made decisions for Mrs. Van Alen, on the basis of  
11 my technical analysis I made decisions on my judgment that  
12 I thought were in her best interest.

13 Q Fine. Mr. deGive, what I want to know is this:  
14 Your system would apply to operating an account for a  
15 long-term investor, would it not?

16 MR. BARIST: Objection, your Honor. Your Honor  
17 sustained me a moment ago when I said first lay a  
18 foundation. The question was asked to the witness: Did  
19 you consider Mrs. Van Alen a trader, and he is saying, I  
20 understood his answer to be, "These definitions of  
21 trader, investor, had nothing to do with the way I  
22 applied my account to Mrs. Van Alen. I did my best on  
23 the technical material."

24 THE COURT: To that extent, sustained.

25 MR. BARIST: And I object to this question.



MR. SHAFFER: To that extent, your Honor?

THE COURT: Please proceed.

Q Does an intermediate investor mean anything to you as a term?

MR. BARIST: Same objection, your Honor, until it is of some relevance.

THE COURT: Sustained.

Q Let me ask you this: Does one who is under an imposition or a limitation that he is to mature money, does he trade that money?

MR. BARIST: Objection, your Honor.

THE COURT: Sustained.

Q In your trade do conservatism and conservation of funds go hand in hand with long-term trades as opposed to short-term trades?

MR. BARIST: Objection, your Honor.

THE COURT: Sustained.

Q Did you consider Mrs. Van Alen a long-term holder?

MR. BARIST: Objection, your Honor.

THE COURT: He may answer. Overruled.

A In handling Mrs. Van Alen's securities, I evaluated the relationship --

MR. SHAFFER: That is no answer at all.



MR. BARIST: Excuse me --

MR. SHAFFER: I object to it right now. That is not responsive.

THE COURT: Strike it. It is not responsive.

MR. SHAFFER: Start again, Mr. deGive.

MR. BARIST: Your Honor, I believe he was answering that question.

MR. SHAFFER: Mr. Barist is --

THE COURT: The objection is overruled. See if you can answer that somewhat directly.

A I considered Mrs. Van Alen's investments, to hold them when conditions were favorable and to sell them when, in my judgment, conditions were turning unfavorable.

Q When you bought for Mrs. Van Alen on February 11, 1969, did you expect to sell for her within a week the stocks she had bought?

A At the time I bought them?

Q Yes.

A No.

Q Were you planning to hold them longer than a week?

A I had no definite time.

Q I just asked you, were you planning to hold them longer than a week when you bought them?



MR. BARIST: I am going to object to the form.

THE COURT: Overruled.

A I planned to hold them as long as the technical material was favorable.

Q When you bought them, did you have an expectation that the technical material would be favorable for longer than a week?

A Yes.

Q Didn't you buy them as a long-term buy thinking that the technical material would be favorable and in an uptrend or a long term as opposed to a short term?

A The technical material does not indicate how long an advance will last.

Q When you used the term that an important buy bottom is coming, what does that signify?

A That the market is in the process of making an important bottom from which will be a worthwhile advance.

Q What is a worthwhile advance?

A An advance where holding securities will be worthwhile.

Q Is there any minimum number you can ascribe to a level rise?

MR. BARIST: Will you read back that question, please.



(Question read)

A Well, certainly more than a few points.

Q Ten?

MR. BARIST: I am going to object, your Honor.  
I think at this point it is getting irrelevant.

MR. SHAFFER: Oh, it is getting more relevant,  
Judge.

THE COURT: I will allow it.

Q Ten?

MR. BARIST: Ten what?

Q Points.

MR. BARIST: On what?

MR. SHAFFER: I think the witness understands  
the question.

THE COURT: The question is whether the witness  
is able to answer the question in its present form. If  
so, you may answer.

A It's difficult to answer the question in just  
that form, your Honor.

THE COURT: All right. Reframe the question.

MR. SHAFFER: I want to show the witness a  
group of papers, your Honor, that have been marked or  
have been ascribed a number Plaintiff's Exhibit 10.

THE COURT: All right, sir. That is the



1 Plaintiff's 10 for identification?

2 MR. SHAFFER: Correct.

3 THE COURT: We are going to continue until  
4 about 4:30 or so.

5 MR. SHAFFER: I will be done, Judge, not  
6 completely with the witness, but on this area.

7 THE COURT: Yes.

8 MR. SHAFFER: I think I will anyway.

9 Q Mr. Witness, that is your technical letter, is  
10 it not, on Dominick & Dominick stationery? The top page  
11 is for the period January 12, 1970? The top page.

12 A Yes.

13 Q And the next one is November 10, 1969, and the  
14 next one is May 26, 1969; February 11, 1969; and February  
15 17, 1969. Right?

16 A Yes.

17 Q In your letter dated January --

18 MR. BARIST: Excuse me, your Honor. Could I ask  
19 that Mr. Shaffer withdraw from the witness, please?

20 MR. SHAFFER: Surely. If you have another  
21 copy.

22 MR. BARIST: Don't you have copies of your  
23 exhibits?

24 MR. SHAFFER: I have that one.  
25



MR. BARIST: In that case, give him a copy.

MR. SHAFFER: Your Honor, I ask permission to stand next to the witness just for these three questions. May I have it?

THE COURT: All right, go ahead.

Q In your letter of January 12, 1970, the last sentence says: "Traders may return to the sidelines in anticipation of an intermediate down cycle." Is that right, does it say that?

A Yes.

Q The letter of May 26, 1969, says, "Investors should now adopt a policy of eliminating weak holdings." Does it say that?

A Yes.

Q What has been marked as Plaintiff's Exhibit -- I am going to show you a Technical Comment of yours dated February 20, 1968, which has not been marked for identification. Do you see that?

MR. BARIST: I am going to object to a question being asked on it, your Honor.

THE COURT: Mark it as Plaintiff's 10A.

MR. KAMERMAN: It is Defendants' 116 for identification.

MR. SHAFFER: It is Defendants' 116.



MR. BARIST: Your Honor, Defendants' 116 is all the Technical Comments, not just one sheet.

MR. SHAFFER: All right. Then it is a sheet from 116.

Q In that one the last sentence begins, "Agile traders may take advantage of a rebound in individual issues but long-term commitments should be deferred until there is more definite evidence of an important bottom formation in the majority of stocks." Do you see that?

A Yes.

THE COURT: Is it in evidence?

MR. SHAFFER: No.

THE COURT: None of this is in evidence. What do you want to do about that, counsel?

MR. SHAFFER: I don't want to put it in evidence at this time. I just want to show him something, like I can show him a nat, a hawk or a hoe, and then ask him questions.

THE COURT: You are not doing that. You are not asking for his own recollection about something. You are really asking him whether something appears in some document.

MR. SHAFFER: Only as a foundation.



1 [473] deGive - direct A-366  
2 THE COURT: And getting on to the record what  
3 is in the document, and the document is not in evidence  
4 in the event that we wish to review it.

5 MR. SHAFFER: I understand, your Honor.

6 THE COURT: That is the practical problem.

7 MR. BARIST: I would move, your Honor, to either  
8 require Mr. Shaffer to offer the documents in evidence or  
9 I move to strike the line of testimony as reading from  
10 a document not in evidence.

11 MR. SHAFFER: I have no objection to offering  
12 them in evidence.

13 THE COURT: All right.

14 MR. BARIST: What is being offered in evidence?

15 THE COURT: First of all, with reference to the  
16 items which have been specifically read from, they are  
17 offered as Plaintiff's 10 for identification, and I  
18 gather then that is without objection by Mr. Barist?

19 MR. BARIST: I will object to the February 1968  
20 as being outside the period of the complaint.

21 THE COURT: He did not read from that one as far  
22 as I know. He only read from --

23 MR. SHAFFER: But I am offering it.

24 THE COURT: -- read from three.

25 MR. BARIST: I am objecting to February 1968 as



1 being before the period of the complaint. I am not  
2 objecting to the others.

3 THE COURT: One moment, please.

4 MR. BARIST: The complaint is February 11, 1969,  
5 your Honor.

6 MR. SHAFFER: Your Honor, he is trying to put in  
7 two rules on me.

8 THE COURT: Let us not get bogged down. We will  
9 take that one up another time, tomorrow morning perhaps.  
10 The one dated January 12, 1970 received.

11 MR. SHAFFER: Thank you.

12 THE COURT: The one dated 5/26/69, received.  
13 Kindly underline the portions which have been read, for  
14 the Court's benefit, preferably in a red pencil or black  
15 marker.

16 Defendants' 116 in evidence dated 2/20/68 --

17 MR. BARIST: That is the one that we are not  
18 putting in now. 2/20/68. That was the one that was  
19 outside the period of the complaint.

20 MR. SHAFFER: Judge, I want to address myself  
21 to that, if I may.

22 THE COURT: All right, speak to that, counsel.

23 MR. SHAFFER: All right. In his documents he  
24 goes all the way back to 1960.  
25



1 MR. KAMERMAN: '53.

2  
3 MR. SHAFFER: '53, in developing patterns of  
4 trades and so forth. I just want to go a few days  
5 before --

6 THE COURT: I think that is a sufficient basis.

7 MR. SHAFFER: Thank you.

8 MR. BARIST: Your Honor, may I point out that I  
9 have marked for identification numerous documents which I  
10 am not going to offer in evidence, but as a matter of  
11 avoiding any claim of surprise I list everything I can  
12 think of and I will pick and choose what is relevant.  
13 At this point in time I see nothing relevant outside the  
14 time of the complaint.

15 THE COURT: Let me make a ruling. Defendants'  
16 116 in evidence relating to February 20, 1968, received.

17 MR. SHAFFER: Thank you.

18 THE COURT: Let us interrupt at this point.  
19 But the particular item, however, that you referred to I  
20 will ask that that sheet be specifically identified in  
21 some fashion, this 116.

22 MR. SHAFFER: I will do that.

23 THE COURT: How do we identify it for the record?

24 MR. SHAFFER: Next number.

25 MR. BARIST: Your Honor --



1 [476] deGive - direct A-369  
2 MR. SHAFFER: The judge wants to know our next  
3 exhibit number.

4 THE COURT: I want to know on that particular  
5 document.

6 MR. SHAFFER: 249. Up in the left corner. It  
7 is dated February 20, 1968.

8 THE COURT: Fine. Step down.

9 MR. SHAFFER: Judge, could I ask one other  
10 question, because I am right in the middle of something  
11 and I will break within thirty seconds?

12 THE COURT: Go ahead.

13 (Plaintiff's Exhibit 10 received in evidence.)

14 MR. SHAFFER: Now I want to offer a document  
15 which is marked August 12, 1968, in the upper left-hand  
16 corner as 272, and it is dated August 12, 1968. It is  
17 Mr. deGive's technical letter.

18 MR. BARIST: May I see it?

19 MR. SHAFFER: Yes, you can in a minute.

20 Q I am going to ask you, Mr. deGive, if you  
21 recognize that as being one of your technical letters  
22 dated August 12, 1968. I don't want you to read it now.  
23 I just want to know: Do you recognize it?

24 A Oh, yes.

25 MR. SHAFFER: Thank you.

XXX



MR. BARIST: May I be heard?

MR. SHAFFER: Wait a minute. I am going to show it to you.

MR. BARIST: Fine. I would like to be heard on it.

THE COURT: Give me the marking on it again.

MR. BARIST: This is from Defendants' 116, No. 272 for identification, dated August 12, 1968. Objection to this, (1) irrelevant, (2) as to both this document and the previous document from 116. The plaintiffs did not mark these as their exhibits, and now we are seeing them coming in on plaintiff's case. We have seen this three or four times before, and now I am going to start objecting.

THE COURT: We can re-mark them, if that is the problem. We can re-mark them.

MR. BARIST: I further urge that it is outside the period of the complaint and urge that it be denied. There is no relevance of this document. I don't know whether it is relevant or not at this point. As counsel undertakes to develop his line of inquiry, whatever it happens to be, I gather it is related to the method employed by the witness in either achieving or not achieving the goals of nurturing the account.



MR. SHAFFER: Right. And terms he uses.

THE COURT: I think it is relevant. I am prepared to have it marked as a plaintiff's exhibit. Counsel, you are directed to act accordingly. Work it out with the clerk and on the record. What was that marking on that 2/20?

MR. SHAFFER: August 12, 1968, is 272, Judge. February 20, 1968 is marked as 249.

THE COURT: No. 249. All right.

MR. BARIST: Could we have those marked as plaintiff's exhibits at this point?

THE COURT: Yes. Take care of it on the record.

MR. SHAFFER: It is convenient now to break, your Honor?

THE COURT: Step down, sir, if you will.

We will resume tomorrow morning at 10 a.m.

Thank you.

MR. SHAFFER: Judge, I am going to try to finish tomorrow with this witness.

THE COURT: Excellent.

(An adjournment was taken to November 11, 1976, at 10 a.m.)

New York, N.Y.

November 11, 1976 - 10 a.m.

THE COURT: Good morning. Step up, Mr. deGive.

P A U L d e G I V E, resumed.

THE COURT: You are still under oath.

Whenever you are ready, Mr. Shaffer.

MR. SHAFFER: Thank you, your Honor.

DIRECT EXAMINATION (continued)

BY MR. SHAFFER:

Q Good morning, Mr. deGive.

A Good morning.

Q Mr. deGive, on the Bank of New York account, before it was transferred to the First National City Bank, when a trade was made under your discretionary power by calling the bank and telling them to execute a transaction of a buy or a sell, did Dominick & Dominick receive a commission on that transaction?

A It did.

Q Was that at your request?

A Yes.

Q Whom did you make the request to?

A Well, when the account was opened and I gave orders, I said, "And you will put that through Dominick & Dominick for my credit," and they said, "Yes."



1 [480] deGive - direct A-373  
2 Q Then on each subsequent order did you make  
3 the request?

4 A No.

5 Q Did you have the power to tell the Bank of New  
6 York what broker they were to use in executing transactions  
7 for Mrs. Van Alen's account?

8 MR. BARIST: Objection.

9 THE COURT: Just a moment. What is objectionable  
10 about it?

11 MR. BARIST: It calls for a legal conclusion.  
12 It is irrelevant.

13 MR. SHAFFER: Do you wish to argue?

14 THE COURT: It is easily dealt with by reframing  
15 the question.

16 MR. SHAFFER: All right.

17 Q Did Mrs. Van Alen give you any written  
18 instructions that when you transacted purchases or sales  
19 at the Bank of New York that you were to get credit and  
20 so tell the Bank of New York?

21 A To my knowledge she gave no written instructions.

22 Q Did she give any oral instructions to that  
23 effect?

24 A She told me, "Paul, you will get the commissions  
25 on them."

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Q Oh, she did say that? She said, "Paul, you will get the commissions on that"?

A "The business will be done through you, or your firm."

Q Now, which did she say? "The business would be done through your firm" or "Paul, you will get the commission"?

A She said, "The business will be done through your firm, of course."

Q She did not say, "Paul, you will get the commissions," did she?

A No.

Q Were you mistaken when you said --

A Yes.

Q -- that she said, "Paul, you will get the commissions"?

MR. BARIST: Objection, your Honor. I think that is argumentative.

THE COURT: Go ahead.

Q What is your answer, Mr. deGive?

THE COURT: He said that that was a mistake. Did you not?

THE WITNESS: Yes.

Q Did you ever have a conversation with Mr. Muecke



about that?

THE COURT: About?

Q About seeing to it that Dominick & Dominick got the commissions on transactions that were executed in the Bank of New York account.

A When the account was opened I did.

Q Then, had you not had a discussion with Mr. Muecke, is it your understanding that the Bank of New York could select any broker they wanted to, to make a trade?

MR. BARIST: Objection.

MR. SHAFFER: It was his understanding, Judge.

THE COURT: He is a long time in the field. I will take it.

Q Yes, sir?

THE COURT: I take it that it is custom and practice, though?

THE WITNESS: Yes. That was going to be my answer, your Honor.

Q What was going to be your answer?

A That it's the normal -- it is the custom and practice in the industry.

Q What is?

A That when an individual has discretionary

power over an account, that the business, in the normal course of business, will be done through that brokerage firm.

Q We are talking about a different custom and practice. I am asking you, that if you did not have any conversation with Mr. Muecke, would it be the custom and practice for the Bank of New York to shop around and make the transaction where they saw fit?

A Not necessarily.

THE COURT: You mean it would have been up for grabs and unclear?

THE WITNESS: No, your Honor. When banks were aware of the fact that an individual had discretionary power, they assumed that there was a relationship between the person of the account and the individual who had the discretionary power, and too, from a public relations standpoint, they would place the orders through that individual's firm or company.

Q Then it would be unnecessary for you to ask the Bank of New York to place the transactions through Dominick & Dominick, because under the usual custom and usage in the business that would have been done, once they knew you had a discretionary power, isn't that so?

MR. BARIST: Objection to the form.



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THE COURT: Overruled.

A I called Mr. Muecke --

Q Just answer the question.

THE COURT: Maybe you can answer that, sir.

A I called Mr. Muecke at the time the account was opened, and I said, "When you put the orders through Dominick & Dominick" --

THE COURT: No, that does not answer the question. The question is, if you had not called him.

Put the question.

THE WITNESS: Would you repeat the question?

MR. SHAFFER: Yes.

THE COURT: Essentially, what counsel is saying is that if you had not called him and discussed this with him, as you say you did, do you understand that the custom would have been that the business would have been transacted through Dominick & Dominick anyhow and you would have gotten permission because of your relationship with Dominick & Dominick?

THE WITNESS: Yes, your Honor.

Q In short, all the bank had to know was that you had discretionary power and then the custom and practice that you testified to is, they would have transacted through you or Dominick & Dominick.

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A Yes.

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4

5

Q Did you talk to them each time you put an order in and request that the orders go through Dominick & Dominick?

6

MR. BARIST: Asked and answered.

7

THE COURT: I will allow it.

8

Q What is your answer, Mr. deGive?

9

A Would you repeat the question, please?

10

(Question read)

11

A No.

12

13

14

Q From time to time did you have discussions with Mr. Muecke on an ongoing basis about putting orders through Dominick & Dominick so you would get the credit?

15

A I may have.

16

Q Do you recall?

17

18

A In my mind it was assumed they would put them through Dominick --

19

Q Do you recall?

20

A I recall at the time the account was opened.

21

22

Q No, I said from time to time on an ongoing basis.

23

A A specific time?

24

Q Yes.

25

A No.



1 [486]  
2 Q Referring to your deposition given on March 9,  
3 1972, page 67 --

4 MR. BARIST: Give us a second to find it.

5 MR. SHAFFER: I surely will.

6 Q Line 7:

7 "Question: The question was whether you had any  
8 recollection of talking to anybody at the Bank of New  
9 York about the procedure of putting the trades through  
10 Dominick that you called for in Mrs. Van Alen's account.

11 "Answer: From time to time I talked to Mr. Muecke.

12 "Question: About the subject of putting trades  
13 through Dominick?

14 "Answer: Yes."

15 Did you give that answer to that question?

16 A Yes.

17 Q Was the testimony true when you gave it?

18 MR. BARIST: Your Honor, if this is being put  
19 in for purpose of impeachment, it is not contradictory to  
20 what the witness just said. He said he had such  
21 conversations from time to time. He could not recollect  
22 the specific one.

23 THE COURT: Isn't that so?

24 MR. SHAFFER: No, your Honor. The thrust of  
25 his testimony this morning, I believe, was that when the

1  
2 account was opened he had a conversation and thereafter  
3 between that conversation and custom and usage, Dominick &  
4 Dominick got the trades. I think this brings out the  
5 fact that from time to time, when orders were put through,  
6 he spoke to Mr. Muecke and that he had insured the fact  
7 through these conversations that he got the commissions.  
8 And I just want to bring that out.

9 THE COURT: I had thought that that was his  
10 answer.

11 MR. SHAFFER: All right. Your Honor, I am sorry  
12 that reasonable minds differ on objective propositions,  
13 but I hope I am in the class of reasonable minds. I would  
14 like him to answer whether that testimony was true when it  
15 was given. Will you allow?

16 THE COURT: Let us put it this way -- all right,  
17 go ahead, answer the question.

18 Q Was that testimony true when you gave it?

19 A Yes.

20 Q Is it true today?

21 A Yes.

22 Q Thank you. When the account was transferred to  
23 the First National City Bank, did the First National City  
24 Bank personnel know that you had a discretionary power to  
25 execute purchases and sales, of course to be executed



1 purchases and sales in the custodian account which began  
2 there approximately in October 1969?

3  
4 A They told me they had.

5 MR. SHAFFER: Would you read back the question,  
6 please.

7 (Question read)

8 Q The question was, did they know, and you told  
9 me they had. I don't follow the answer. Did they know  
10 you had a discretionary power?

11 MR. BARIST: Your Honor, I think that has been  
12 answered.

13 THE COURT: It seems so. Next question.

14 MR. SHAFFER: All right.

15 Q At that time, when that account was opened, did  
16 you have any conversations with personnel at the First  
17 Naticnal City Bank?

18 A Yes.

19 Q Did you ask them to put trades through Dominick &  
20 Dominick?

21 A Yes.

22 Q You did not rely on custom and usage?

23 A When I called them to give an order the first  
24 time.

25 Q Whom did you speak to?

1 [489] deGive - direct A-382  
2 A Either Mr. McLean or someone that he referred  
3 me to.

4 Q What did you tell him?

5 A I said, "These are orders for the purchase in  
6 the account of Mrs. Van Alen, and when you put them  
7 through Dominick & Dominick, make it for my credit."

8 Q Was your request that he put them through  
9 Dominick & Dominick, or that when he put them through  
10 Dominick & Dominick they be for your credit?

11 A When he put them through Dominick & Dominick,  
12 to make it for my credit.

13 Q Did you ask him to see that on each occasion  
14 that they were put through that it would be at Dominick &  
15 Dominick?

16 A No.

17 MR. SHAFFER: Page 77, line 14. Are you with  
18 me?

19 MR. BARIST: Yes.

20 Q "Question: But you cannot recall discussing  
21 with anyone at the bank any specific instructions that  
22 these transactions were to go to Dominick" -- skipping  
23 the colloquy. 21.

24 "Answer: At one time I may have mentioned to the  
25 officer when I was giving instructions that the orders



1 were going through Dominick & Dominick, were to be put  
2 through Dominick & Dominick."

3 Were those your instructions?

4 A My instructions were to be put through Dominick &  
5 Dominick for my credit.

6 Q What I read you, is that an answer you gave to  
7 the question that was asked you on the date you were  
8 deposed?

9 A At that time I did give that answer.

10 Q Was your testimony true then?

11 A Yes.

12 Q Is it true today?

13 A With the added factor of "for my credit."

14 Q You did not say, "for my credit," when you were  
15 deposed?

16 A No.

17 MR. BARIST: Objection, your Honor; argumentative.

18 THE COURT: Sustained.

19 Q Mr. deGive, do you recall that you had a  
20 dramatic drop in income in 1970?

21 A Yes.

22 Q Did you go approximately from the level of,  
23 say, \$116,000 in 1969 to \$49,377 in 1970?

24 A Yes.

1 as meaning there is to be no surprise in terms of what  
2 documents are apt to be before the Court by one side or  
3 the other. You can use each other's documents and you  
4 cannot claim surprise is what I am saying.  
5

6 MR. SHAFFER: Thank you, Judge.

7 THE COURT: On relevance, I am going to accept  
8 it, not with a subject-to-connection ruling, but with the  
9 understanding that if perchance it is warranted down the  
10 line, Mr. Barist can make a motion to strike.

11 MR. SHAFFER: I face that problem with all my  
12 proof.

13 THE COURT: That is right. Let us go forward.  
14 We have 33 and 34 offered.

15 (Plaintiff's Exhibits 33 and 34 received in  
16 evidence.

17 BY MR. SHAFFER:

18 Q Mr. deGive, your system used a seven-day moving  
19 average, a ten-day moving average, a twelve-, an eighteen-,  
20 and a thirty-, and others. Isn't that so?

21 A Yes.

22 Q From these moving averages you got signals, did  
23 you not?

24 A I did.

25 Q And I have not exhausted all the sources within

XXX



1  
2 your system from which you did get a signal or could  
3 get a signal, isn't that so?

4 A Yes.

5 Q Indeed, there was an hourly index which is on  
6 the big scroll-type chart, which for the record we will  
7 identify as Defendants' Exhibit No. 17 for identification.  
8 You know what chart I mean.

9 A Yes.

10 Q There are perhaps as many as eight indicators on  
11 that chart, is that so? Perhaps as many as eight?

12 A I would say seven.

13 Q I hope you say seven later when we get the  
14 chart.

15 MR. BARIST: Objection, your Honor.

16 Q All right, perhaps as many as seven. And  
17 they were buy indicators and sell indicators, isn't that  
18 so?

19 A Your Honor, on that chart I would --

20 THE COURT: You know we are talking about a  
21 chart that is only marked for identification.

22 MR. SHAFFER: I know that.

23 THE COURT: All right.

24 MR. SHAFFER: It is not to prove the content  
25 of the chart, your Honor. It is to have a few words about

1 the system.

2 THE WITNESS: May I change my testimony, your  
3 Honor?

4 Q Certainly change it all you want.

5 A On that chart there are five indicators.

6 Q Are they buy and sell? Can you get a buy  
7 signal and a sell signal from those buy and sell  
8 indicators?

9 A Yes.

10 Q Because on some of your other charts there are  
11 indicators that only apply to sell situations and not  
12 equally to buy and sell, isn't that so?

13 A Yes.

14 Q And there are even some other charts where the  
15 indicators only or an indicator only applies to a buy  
16 situation as opposed to a sell situation, isn't that  
17 correct? Maybe no?

18 A Would you repeat that question?

19 Q I will withdraw it.

20 Mr. deGive, when you got a buy or a sell signal,  
21 depending on what type of account you were trading for,  
22 you would look for confirmation, wouldn't you?

23 A After analyzing the technical material, and in  
24 my judgment deciding that it was a buy signal, I would buy.  
25



2 Q Wouldn't you look for some additional  
3 confirmation?

4 A From what?

5 Q From additional indicators that were available  
6 to you.

7 A Yes.

8 Q If you got a buy signal on an eighteen-day  
9 indicator, might you look for confirmation on the thirty-  
10 day moving average?

11 MR. BARIST: Your Honor --

12 MR. SHAFFER: What is wrong with that, Judge?  
13 There is nothing wrong with that. I am asking him a  
14 question about his system. I don't mind an objection  
15 if there is a basis for it, but, your Honor, I would like  
16 to try and complete my part of the case within the number  
17 of days you asked me to complete it. I realize I am  
18 helping proving Mr. Barist's case and maybe on the seven-  
19 day total we are doing all right, but --

20 THE COURT: What is the problem?

21 MR. BARIST: I don't see how hypothetical  
22 questions on how the system works should be received or  
23 are relevant until we have gotten some foundation as to  
24 how the system is applied by Mr. deGive to Mrs.  
25 Van Alen's --

1 [509] deGive - direct A-388  
2 THE COURT: We have sort of gone through that.  
3 I am going to take it and let counsel establish his order  
4 of proof.

5 MR. SHAFFER: Thank you.

6 THE COURT: The system permits that approach as  
7 well.

8 MR. SHAFFER: Thank you.

9 May I have the question read, please.

10 (Question read)

11 A That was not the basis on which I, over a period  
12 of years, had used the material.

13 THE COURT: So the answer is no?

14 THE WITNESS: "No." May I add to that, your  
15 Honor?

16 THE COURT: Yes.

17 THE WITNESS: I did not analyze any one indicator  
18 of any by itself to get confirmation, and later get  
19 confirmation in the other indicators. In analyzing the  
20 technical material, I analyzed all the material at the  
21 same time.

22 Q Mr. deGive, in 1969 did the total value of  
23 Mrs. Van Alen's accounts over which you had discretionary  
24 power in trading pursuant to that power amount to  
25 approximately a million and a half dollars in value?



1 [510] deGive - direct A-389  
2 THE WITNESS: Your Honor, would he rephrase  
3 that question about trading?

4 MR. SHAFFER: I will shorten it for him.

5 Q The accounts that were placed with you, on  
6 whatever basis they were there, in, say, beginning of  
7 1969, would the value of either the cash, securities,  
8 bonds, whatever was there, approximate a million and a  
9 half dollars?

10 A To the best of my recollection, yes.

11 Q Now --

12 THE COURT: That was a million, was it?

13 MR. SHAFFER: One million and one-half.

14 THE COURT: All right.

15 Q Would a purchase or a sale of \$750,000 be a  
16 major move in those accounts? Yes or no if you can.

17 A Yes.

18 Q And then any explanation you want to give.

19 A Yes.

20 Q Would a million dollars be a major move?

21 A Yes.

22 Q Would \$1.4 million be a major move?

23 A A million dollars or a major move --

24 Q I just want the answer. I don't want your  
25 inductive reasoning process.

MR. BARIST: The witness is answering the question.

MR. SHAFFER: I understand. I just want his answer, not his inductive process.

Q What is the answer?

A Yes.

Q Showing you Plaintiff's Exhibit 2 in evidence, there are purchases on 2/11, 2/12, 2/14, which extend over to the first item on page 2. Isn't that so?

A On this schedule, yes.

Q And that is in evidence and do you accept the fact that on that date you made those trades?

A I do.

MR. BARIST: I object, your Honor. If it is in evidence, it is in evidence.

THE COURT: We have the answer.

MR. SHAFFER: Thank you.

Q On that day did you invest to near a hundred percent, if not a hundred percent, my client?

A I can't calculate the figures. I will answer it was a major.

Q Was it a major move?

A Yes.

Q In 1969, when you made that major move for my client, did the sixty-day cycle have to be consulted by



1  
2 you?

3 A Yes.

4 Q Did the position of that cycle have to be  
5 favorable before you would make a purchase --

6 A Yes.

7 Q -- in a major move?

8 A Yes. In my judgment it had to be favorable.

9 Q Did you obtain a signal from the favorable  
10 position of that sixty-day cycle?

11 A In considering that with the other material,  
12 yes.

13 Q Was that part of your signal?

14 A Yes.

15 Q If that sixty-day cycle and its favorable  
16 position were absent from your analysis of what you  
17 looked at, would you make a major move for Mrs. Van Alen  
18 in 1969 on the purchase side?

19 A No.

20 Q Is the sixty-day cycle short, intermediate,  
21 or long?

22 A It is a sixty-day cycle.

23 Q Have you described your sixty-day material as  
24 being short, intermediate, or long in the past?

25 A Yes.

1 [522] deGive - direct A-392  
2 Q How about the thirty-day?

3 MR. BARIST: That has been asked and answered,  
4 your Honor.

5 THE COURT: It has, it has.

6 Q Is the six-month long term?

7 MR. BARIST: Asked and answered.

8 MR. SHAFFER: I don't know. Has that been  
9 answered? I don't know.

10 THE COURT: Well, 120 days was asked and  
11 answered.

12 MR. BARIST: That is the six-month signal.

13 MR. SHAFFER: Thank you.

14 Q Would it be true that for the years 1962 -- or  
15 let us say for the years backwards from 1968 to 1962, that  
16 in making a purchase for Mrs. Van Alen's accounts you would  
17 make the purchase on the seven-, the ten-, the twelve-,  
18 the eighteen-, the thirty-, and the sixty-day indicator  
19 being in a favorable position?

20 A If they were giving a favorable signal.

21 Q Yes. You required the sixty days as part of  
22 your analysis?

23 A Yes.

24 Q Does the market being in an intermediate,  
25 oversold condition mean anything to you as a definition?



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A Yes.

Q What does it mean?

MR. BARIST: My objection, your Honor.

MR. SHAFFER: It is one of these order-of-proof objections, your Honor. We are coming to it and I am going to hook it up.

THE COURT: Put it in.

MR. SHAFFER: Let Mr. Barist have a continuing objection to all that, Judge, and we can keep moving.

Q Go ahead.

A It means that the intermediate indicators are in an oversold condition, on the basis of my analysis.

Q What are those intermediate indicators?  
Name them.

A The thirty-day.

Q Yes? It does not include the sixty?

A As an intermediate oversold condition?

Q Yes.

A Not necessarily.

Q If you were making a buy on an intermediate oversold condition, would you require the sixty-day indicator to be giving a favorable signal or being up?

MR. BARIST: Objection, your Honor, to the form. First, it is compound.

MR. SHAFFER: Your Honor, that is the first objection we have had on compound questions, and Mr. Barist --

THE COURT: Overruled.

MR. SHAFFER: -- has done the best he can on --

THE COURT: Overruled. Go ahead.

Q Go ahead.

A Would you repeat the question?

MR. SHAFFER: Will you read the question, please.

(Question read)

A I would require it to be giving a favorable signal.

Q What would that favorable signal be?

A By analyzing the material. In my judgment I would decide whether it was giving a favorable signal or not.

Q Would it be up or would it be down?

A That material is not read that exactly.

Q Tell me what a favorable -- describe some favorable condition that the sixty-day material gives on one occasion and tell me contrasted to unfavorable condition on another occasion.

MR. BARIST: Objection.

THE COURT: Overruled.



1 [525] deGive - direct A-395  
2 THE WITNESS: Your Honor, may I have that  
3 question about the intermediate oversold condition  
4 repeated again?

5 THE COURT: Read it back.

6 (Record read)

7 THE WITNESS: May I change that first, have  
8 that first question: intermediate oversold condition  
9 in the market, what does it mean to you? Start from  
10 there, if you don't mind.

11 MR. SHAFFER: Your Honor, I object to this.  
12 I think it should be brought out on redirect.

13 THE COURT: No. If he is going to correct it,  
14 I think he can correct it now.

15 MR. SHAFFER: All right.

16 (Answer read, as follows: "A It means that  
17 the intermediate indicators are in an oversold condition,  
18 on the basis of my analysis.")

19 THE WITNESS: Judge, may I add to my answer?  
20 It means the intermediate indicators, as well as the  
21 seven- and ten-, and the eighteen-day, and the twelve-  
22 day, are also in an oversold condition.

23 Q Must the seven be in it?

24 A Must the which?

25 Q The seven.

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A I thought I said seven, ten --

Q I am asking you. I am saying: Must the seven  
be in there?

A In my analysis of the material, it must be.

Q All right. Were you asked this --

A It must have been there or be there.

Q Were you asked this question and did you give  
this answer --

MR. SHAFFER: Mr. Barist, page 195, at the  
bottom of the page, line 23.

Q "Question: What does it mean, oversold on an  
intermediate term basis?

"Answer: That means when the twelve-day is at the  
lower range, the eighteen-day is at the lower range, the  
eighteen-day selling is at its high range, and the ratio  
of the thirty-day material is at a low ratio."

You did not mention -- withdrawn.

Did you give that answer to that question?

A I did.

Q Was the answer true when you gave it?

A With the addition of the seven-day --

Q No. Just: Was it true when you gave it --

A Yes.

Q -- the way I read it?



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A Yes.

Q Is it true today the way I read it?

A Yes.

Q It does not mention seven days, does it? Yes  
or no.

A It does not mention seven-day, and in my  
testimony I did not include the seven-day.

MR. BARIST: Your Honor, for purpose of fairness --

THE COURT: Page?

MR. BARIST: -- I request to read 195,  
immediately preceding the question.

MR. SHAFFER: No, Judge. No, Judge, this is  
redirect.

THE COURT: One moment, please.

MR. SHAFFER: I object, your Honor.

THE COURT: Not at this time.

MR. BARIST: Your Honor, I think under Rule 32(a)(4)  
I have the right to have the deposition complete.

THE COURT: It is a right that I am not allowing  
you to exercise at this time. You may have that right  
at a later point. I have the obligation to conduct the  
trial in an orderly fashion. Under that obligation I  
say no, do it later.

MR. SHAFFER: Thank you, Judge.

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Q Did you ever discuss with Mrs. Van Alen purchasing on the basis of the market being in an intermediate oversold condition?

A I could have. I wrote it in my letter.

Q Your letter to whom?

A Technical Comments.

Q No. I was just meaning a communication between you and Mrs. Van Alen. Do you recall ever having a discussion with her on making purchases in the market when it was in an intermediate oversold condition?

A Yes.

Q Do you remember when that was?

A No, I do not.

Q You said you do not.

A I do not remember a specific instance.

MR. SHAFFER: Mr. Barist, I am going to start on page 183.

THE COURT: 193?

MR. SHAFFER: 183, your Honor.

THE COURT: 183.

Q "Question: Did she use those words 'intermediate oversold condition'?

"Answer: She used 'oversold condition.'

"Question: She did not use the words 'intermediate



oversold condition,' is that correct?

"Answer: From time to time she did.

"Question: She did use the words.

"Now, this particular conversation to which you have reference when Mrs. Van Alen used the words 'oversold condition,' when was that?

"Answer: What year?

"Question: That's right.

"Answer: What years?

"Question: No, what year. You were referring, I take it, to a particular conversation when you answered one of the previous questions.

"Answer: In April of 1968 she used the phrase when we bought stocks.

"Question: OK.

"Answer: In October of 1966 she used the phrase, late October, early November 1966, she used the phrase when we bought stocks.

"Question: And in 1966 what did she say?

"Answer: 'When you get an oversold condition in the market and your work turns favorable we will buy -- I want to buy stocks.'

"Question: What did she say in May of 1966?

"Answer:" --

MR. BARIST: '68.

Q -- "1968.

"Answer: April.

"Question: In April of 1968.

"Answer: She asked me if I had an oversold condition in the market and I said yes."

Does that refresh --

A That was April 1968?

Q Yes. That is what you said.

A Yes.

Q Did you give those answers to those questions that I read from those two pages of your deposition?

A Yes.

Q Does that refresh your recollection that you had conversations with my client in which she told you to buy stocks on an intermediate oversold condition?

A Yes.

Q Does that refresh your recollection that you had specific conversations in October of 1966 and in April of 1968?

A You read that in the deposition.

Q I am just asking you: Does it refresh your recollection? I know what I read.

A Yes.



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Q Do you recall where those conversations took place -- withdrawn.

Do you recall where either of those conversations took place?

A Will you repeat the dates, please?

Q All right, let me start with October 1966. That was a conversation.

A No, I do not.

Q But you have a refreshed recollection that that conversation did take place?

A I have so testified.

Q Yes, all right. But you don't recall where it took place, yes or no.

A I talked with the Van Alens on a number of occasions during those years.

Q I understand. I am asking you, do you recall where it took place?

MR. BARIST: Asked and answered.

Q You remember the conversation. I want to know if you remember where it took place.

MR. BARIST: Asked and answered.

THE COURT: Maybe you can tell us the answer again. Do you recall?

THE WITNESS: No, I don't, your Honor.



1 [532] THE COURT: The answer is no.

2 Q Do you recall who was present?

3 A With few exceptions, Mr. and Mrs. Van Alen were  
4 there.

5 Q I am not asking you that. I am asking you:  
6 Do you recall?

7 A On that date?

8 Q Yes.

9 A No.

10 Q Do you recall anything else that was discussed?

11 A Stocks.

12 Q You recall that or is that just because you  
13 always discussed stocks? I am asking for your phantasm,  
14 a recollection revived as you testified this revived your  
15 recollection. Do you recall what else was discussed?

16 A In conversation in meetings with Mrs. Van Alen --

17 Q Just the one I am asking you for is October 1966,  
18 not others. What do you recall about that one, other  
19 than that we had this discussion from Mrs. Van Alen that  
20 she wanted to buy in an intermediate oversold condition?

21 A It was our normal habit and I have no reason to  
22 assume that it was other than the normal habit.

23 Q I am not asking you that. I am asking you what  
24 you recall. Do you recall discussing anything else?  
25



1 [533] deGive - direct A-403  
2 A Anything else than stocks?

3 Q No, anything else other than that she said,  
4 "Paul, buy in an intermediate oversold condition." That  
5 is the only thing you told me you remember.

6 MR. BARIST: Objection, your Honor.

7 MR. SHAFFER: It is cross, Judge.

8 MR. BARIST: It may be cross, but I don't think  
9 that the tone is cross.

10 THE COURT: All right. What is the answer?

11 MR. SHAFFER: Well, we haven't heard one, Judge.

12 THE WITNESS: I have to have the question  
13 repeated, your Honor.

14 THE COURT: Perhaps you can frame it again.

15 Q What do you recall as having occurred at this  
16 meeting in October 1966 as having been said by Mrs.  
17 Van Alen or by you, other than the fact that she wanted  
18 you to buy when the market was in an intermediate oversold  
19 condition, if anything?

20 A I have no clear recollection of what else was  
21 said at that meeting.

22 Q So you don't recall anything else, right?

23 THE COURT: That is what he has told us.

24 MR. SHAFFER: I am asking for these words,  
25 Judge, unless you think I am going too far and you want

me to move on to something else.

THE COURT: I think he said he does not recall anything else that was discussed there.

Is that your answer?

THE WITNESS: That is my answer, your Honor.

MR. SHAFFER: All right. Your Honor, I know that you break at 12:30 for lunch.

THE COURT: We can have a break now.

MR. SHAFFER: I wondered if you would take five minutes.

THE COURT: We will take a recess. Step down, sir.

Approximately how long do you anticipate further examination of Mr. deGive?

MR. SHAFFER: The balance of the day, your Honor, and perhaps into tomorrow, because I have a lot of material to cover, your Honor, and I realize --

THE COURT: I am not so much concerned with the length of time as --

MR. SHAFFER: Could I make a statement, your Honor, while you are thinking about it?

THE COURT: -- whether we are into rebuttal area.



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MR. SHAFFER: No, Judge.

THE COURT: No?

MR. SHAFFER: I will tell you, Judge.

THE COURT: You don't have to state why. We will take a recess.

MR. SHAFFER: May I say to your Honor before you leave the bench that I have done a careful analysis of where we are on the three days allotted to us or four days, and that while I think that with respect to each segment of the defendant or the plaintiff we are behind, on the total case we are well within the total days.

THE COURT: Good.

(Recess)

MR. SHAFFER: If I may, your Honor: Mr. deGive, you are still under oath.

THE COURT: Yes.

Q Mr. deGive, we have gone through this October 1966 conversation and you have told us what you recalled of that. You also testified that there was a conversation in April of 1968 when Mrs. Van Alen mentioned to you something about intermediate oversold condition. What was it that she told you that you recall?

A It was about the time I was purchasing stocks or had purchased stocks, and she said, "Do you have an

intermediate oversold condition," to the best of my memory, and I said, "Yes."

Q Did she indicate to you at that time that she knew what an intermediate oversold condition was with respect to your oscillators, that the definition you gave to his Honor a little while ago when you changed the testimony -- did she repeat that definition to you at that time?

A On the oscillators?

Q Yes.

A No.

Q Where was the conversation?

A I don't remember.

Q Was it on the telephone or was it face to face?

A It could have been on the telephone.

Q Could have been face to face?

A Could have been.

Q Do you know where it was?

A Do I what?

Q Do you know where it was?

MR. BARIST: Asked and answered.

MR. SHAFER: I am trying to get detail, Judge, to see, you know, just how much he recalls about that conversation.



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THE COURT: Answer yes or no, please.

THE WITNESS: What was the question, sir?

Q Do you know where it was?

A No.

Q Do you know who was present?

A Not definitely.

Q Do you know vaguely?

A With one or two exceptions, both Mr. --

Q No, just that time. What you recall. Not based  
on some standard of relationship that you had with --

A To the best of my recollection, it was a  
conversation between me and Mr. and Mrs. Van Alen.

Q Would that have been on the telephone?

A It could have been.

Q What else was said -- withdrawn.

Do you recall Mr. Van Alen being definitely present  
in the conversation, whether it be on the phone or face  
to face?

A Not definitely.

Q Just confining your answers to your definite  
recollection, do you recall anything else that was said  
by you to Mrs. Van Alen?

A I discussed stocks.

Q What stocks did you discuss?

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A The stocks that I was going to or had purchased.

Q You don't recall whether it was that you were going to purchase stocks or that you had purchased stocks, definitely, do you?

A No.

Q Do you recall any issues that you discussed?

A If I saw the list I could.

Q I am just asking you now, based upon your ability to give testimony to his Honor, what do you definitely recall about stocks?

A Well, from time to time we talked about the number of issues.

Q I just mean that one time in October. Excuse me, that one time in April 1968, which you have testified to have a present recollection of.

A One stock was Raytheon.

Q Any other stock you recall?

A We discussed stocks in the airline group.

Q What did you say about that airline group?

A That there are various stocks in the airline industry, and the ones that would be purchased.

Q The ones what, sir? I did not hear that.  
The ones what?

A The ones that had been or would be purchased.



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Q You don't recall which, is that right?

A I believe I answered that, your Honor.

MR. SHAFFER: No, this is about stocks, Judge.

A I don't recall what?

Q Whether you were discussing stocks as having been purchased or would be purchased, this airline group.

A Yes. I don't recall.

Q In that conversation do you recall who first mentioned the subject of the market being in an intermediate oversold condition, you or Mrs. Van Alen?

A No, I do not. She could have said it or I could have said it.

Q Did these conversations that you had in October of 1966 -- do you recall any other conversation at or around October of 1966 with Mrs. Van Alen separate and apart from the conversation we have just gone through when she used the phrase "intermediate oversold condition"?

A Subsequent to October '66?

Q Yes. At or around that time.

A No. I don't believe so. I may have, though.

MR. SHAFFER: Page 184, line 6.

Q "Question: No, what year? You were referring, I take it, to a particular conversation when you answered one of the previous questions.

1 [540] deGive - direct A-410  
2 "Answer: In April of 1968, she used the phrase  
3 when we bought stocks.

4 "Question: OK.

5 "Answer: In October of 1966 she used the phrase,  
6 late October, early November 1966 she used the phrase  
7 when we bought stocks."

8 Did you give that answer to that question?

9 A I did.

10 Q Did you have at that time one conversation in  
11 mind that was either in late October or early November or  
12 did you have two, if you know?

13 A I had more than one.

14 Q Was there a separate conversation from late  
15 October 1966 occurring in November of 1966?

16 A I remember having more than one conversation  
17 with Mrs. Van Alen around that time.

18 Q Meaning when?

19 A I do not recall whether it was in late October,  
20 early November, one conversation. I do recall at around  
21 that time I had more than one conversation.

22 Q How many more than one did you have, that you  
23 recall?

24 A I could have had two, I could have had three.

25 Q Do you remember the two conversations as being



1  
2 separate and distinct in your mind?

3 A To the best of my recollection, I do.

4 Q Was the second conversation on the telephone or  
5 in person?

6 A I don't recall -- remember.

7 Q Do you recall who was present at the second  
8 conversation, at or around that time?

9 A To the best of my recollection, I talked to Mr.  
10 and Mrs. Van Alen.

11 Q Do you recall what was said in the second  
12 conversation at or around that time other than that Mrs.  
13 Van Alen wanted you to buy stocks when the market was in  
14 an oversold intermediate condition?

15 A Again we discussed stocks.

16 Q Were you about to say we would discuss stocks?

17 A We did.

18 MR. BARIST: Objection.

19 Q You did discuss stocks. What stocks did you  
20 discuss in that second conversation?

21 A We discussed the various industry groups and  
22 individual stocks in the groups.

23 Q Which various industry groups did you discuss  
24 in that second conversation?

25 A A cross-section of industry groups.

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[542]

deGive - direct

A-412

Q I say which one.

A We discussed the airlines, railroads.

Q You remember all this?

A To the best of my recollection, we did.

Q What stocks within those industry groups do you recall discussing?

A Well, in the airlines it would be Trans World Airlines, American Airlines, Delta; in the steels it would have -- in the motors it would have been General Motors and Chrysler; in the railroads it would have been a cross-section of railroads.

Q Now you say would have been. I am asking you, do you recall discussing those stocks, not by industry, but do you have a specific phantasm or recollection that you did discuss those stocks you have just named with Mrs. Van Alen in November of 1966 or whenever that second conversation about that time occurred?

A At this time I do not.

Q At no time this morning have you so recollected, have you?

A You are asking me about the April meeting?

Q No, I am talking about the November meeting. You said at this time you do not. I am wondering whether at an earlier time this morning you had a recollection



but you lost it on the way to the courtroom.

MR. BARIST: Objection.

THE COURT: Sustained.

Q I will rephrase it. At any earlier time this morning did you have a recollection about discussing with Mrs. Van Alen the specific stocks you listed in the second conversation in October 1966 that we have just been discussing?

MR. BARIST: Objection.

THE COURT: Overruled.

A I do remember discussing stocks with Mrs. Van Alen in the first or second conversation in the fall of 1966.

Q That is not my question. My question is, in the second conversation I asked you what specific stocks you discussed and you listed stocks, and then you told me you did not have a recollection of discussing those stocks. And I want to know if earlier this morning you had a recollection of discussing those stocks with Mrs. Van Alen in the second meeting in 1966, around October or November.

MR. BARIST: Objection to the character --

THE COURT: Sustained.

MR. SHAFFER: All right.

1 [544] deGive - direct A-414  
2 Q As a result of these discussions, Mr. deGive,  
3 about intermediate oversold condition, did the standards  
4 you used to make purchases for Mrs. Van Alen prior to those  
5 discussions change, so that after those discussions you  
6 used a different standard in analyzing your technical  
7 material?

8 A I made no change in analyzing the standards of  
9 my technical material.

10 Q Did you make a change in the application of the  
11 technical material you analyzed to her purchases or sales?

12 A No.

13 Q In February of 1969, when you made the purchases --  
14 would you look at Exhibit No. 2 which is before you,  
15 Plaintiff's Exhibit No. 2 -- when you made purchases on  
16 February 11, 12 and 14, that are shown on the first page  
17 and the first item on the second page -- second item --  
18 through the second item on the second page, were you  
19 consulting the sixty-day factor along with the other  
20 factors?

21 A Did you say along or alone?

22 Q Along.

23 A I didn't hear the word.

24 Q Along, a-l-o-n-g.

25 A Yes.



1 [545] deGive - direct A-415  
2 Q Was it confirming a purchase?

3 A In my analysis of the sixty-day material, it  
4 was confirming.

5 Q To buy on an intermediate oversold condition,  
6 must that signal confirm a purchase for you to make a  
7 buy under those conditions?

8 MR. BARIST: Objection to the form.

9 THE COURT: Sustained.

10 Q When you were buying in an intermediate oversold  
11 condition, must the sixty-day signal confirm a purchase  
12 signal?

13 MR. BARIST: Objection as to relevancy at this  
14 point.

15 MR. SHAFFER: I will be glad to state it.

16 MR. BARIST: Your Honor, the intermediate  
17 oversold condition I think has now not been tied into  
18 anything having to do with Mrs. Van Alen's account in the  
19 way Mr. deGive has treated it.

20 THE COURT: Overruled.

21 Q Answer the question.

22 MR. SHAFFER: Perhaps it may be read back.

23 (Question read)

24 A It must be in a favorable position.

25 Q Is that confirming a purchase signal given by



the other material?

A It must be giving a favorable signal.

Q In what way must it be giving a favorable signal?

A In analyzing the sixty-day material, in my judgment, it would have to be giving a favorable signal.

Q How would it be giving a favorable signal?

A It would be giving a favorable signal in relation to where it was in its action, the buying and the selling, both.

Q Meaning that the buying was up, on the uptrend?

A The buying would be improving, or it would be in a favorable position between the buying and the selling, and the selling would be declining.

Q Have you ever used the term "short-term trader" in pretrial discovery in this case?

MR. BARIST: Objection.

THE COURT: Sustained.

Q Have you ever used the term "short-term trader" in your description of categories of people for whom you applied the system?

MR. BARIST: Objection.

THE COURT: Sustained.

Q Have you ever used the term "short-term trade"



with respect to purchases being made through the utilization of certain signals given by your system?

MR. BARIST: Objection.

THE COURT: Overruled.

A Yes.

Q Does the short-term trader require consulting the sixty-day signal?

A Not necessarily.

Q Have you used the term "long-term trader" in describing a category of accounts for which you applied your system?

MR. BARIST: Objection.

THE COURT: Overruled.

A Long-term trader?

Q Yes.

A Not to my knowledge.

Q Long-term holder?

A Yes.

Q Is that synonymous with long-term investor?

A Yes, it could be.

Q Is it synonymous with investor?

A No.

Q Did you consider Mrs. Van Alen, in the application of the system that you have devised, as a short-term

trader or as a long-term holder?

A That question cannot be answered yes or no.

Q Did you ever consider Mrs. Van Alen as a long-term holder?

A I did not characterize Mrs. Van Alen as a long-term holder or as a short-term holder or as a trader.

Q You did categorize, however, the people for whom you applied your system and their accounts as falling in the category at a given moment of being accounts of short-term traders, being accounts of long-term holders, being accounts of people who were buying on an intermediate oversold condition, isn't that so, among others?

A Those phrases were accepted in the street as common words of usage.

Q I did not ask if it was accepted in the street. I am asking you in this courtroom whether or not it is not true that at a given moment you considered accounts for which you were making purchases and sales and utilizing your system as falling within the categories we have just mentioned, among others.

A Yes.

Q Did Mrs. Van Alen's account on any day that you handled it ever fall within the category of being an account of a short-term trader?



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A No.

Q Did it ever fall in the category on any day you ever traded it or held it or had anything to do with it as an account of a long-term investor?

A I considered Mrs. Van Alen's account as an investor account.

Q Is that a long-term holder?

A Could be.

Q Did you tell me a minute ago it was synonymous with being a long-term holder?

MR. BARIST: No.

A I am asking: Did you?

MR. BARIST: Objection, your Honor. It is a mischaracterization.

THE COURT: Sustained.

MR. SHAFFER: May I have his last answer read back, please, with respect to what he considered Mrs. Van Alen, so I can place the next question, please.

THE COURT: He said he considered her an investor.

Is that not what you said?

THE WITNESS: Yes.

Q An investor. You did earlier use the term "long-term holder." What is the difference between a

long-term holder and an investor in your mind?

MR. BARIST: Objection.

THE COURT: Overruled.

THE WITNESS: May I have that question repeated, your Honor?

THE COURT: What is the difference between a long-term holder and an investor as far as you are concerned?

THE WITNESS: An investor is an individual that purchases stocks and holds them as long as the signals and conditions are favorable, and when they turn unfavorable in my judgment sells them. A long-term holder is an individual that buys a stock, such as one of the two top banks did, by purchasing a long-term investment in Avon Products at 140 and holding it for a long-term loss.

Q Is the net result of those distinctions that you did on a given day consider Mrs. Van Alen as a long-term investor?

MR. BARIST: Objection.

THE COURT: Overruled.

A I considered Mrs. Van Alen as an investor, and if the signals were favorable, then she became a long-term investor.



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Q You did not hear my question. I said: On any day, in the period from 1953 until 1970 when Mrs. Van Alen took away the account from you, did you consider her a long-term investor?

A If the signals --

Q On any day. That is what I want to know.

MR. BARIST: Your Honor, at this point I think we are getting argumentative and into word games.

MR. SHAFFER: No, Judge. I am trying to get defined answers to defined questions.

THE COURT: Overruled. Would you answer the question.

Q Answer the question. On any day did you consider Mrs. Van Alen a long-term investor in the period I have just described?

A No.

Q On any day did you consider her an investor?

A Yes.

Q Did you give this answer to this question --

MR. SHAFFER: Mr. Barist, I am reading from page 206 of Mr. deGive's deposition, and I am starting at about line 22 -- well, I am starting at 12.

Q "Question: Well, do traders and long-term investors take different action based on the same ten-day

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2 cycle?

3 "Answer: Not on a ten-day cycle. On a seven-, ten-,  
4 or twelve-, eighteen-, and thirty-day.

5 "Question: On those cycles, that set of  
6 cycles --

7 "Answer: And the sixty-day cycles.

8 "Question: On that set of cycles a long-term  
9 investor would take one action and a trader would take  
10 another action, is that correct? Could?

11 "Answer: Could.

12 "Question: So when you took an action for Mrs.  
13 Van Alen in 1969, it was on the basis of cycles that  
14 would apply to long-term investors rather than cycles  
15 that would apply to the trader?

16 "Answer: Yes."

17 Did you give those answers to those questions?

18 A Would you repeat that question, please.

19 Q Yes.

20 MR. SHAFFER: I will start, if I may, your  
21 Honor, and read it exactly as I did before.

22 Q This is line 12:

23 "Question: Well, do traders and long-term  
24 investors take different actions based on the same ten-day  
25 cycle?



"Answer: Not on a ten-day cycle. On a seven-, ten-, twelve-, eighteen-, and thirty-day.

"Question: On those cycles, that set of cycles --

"Answer: And sixty-day cycles.

"Question: On that set of cycles, a long-term investor would take one action and a trader would take another action, is that correct? Could?

"Answer: Could.

"Question: So when you took action for Mrs. Van Alen in 1969, it was on the basis of cycles that would apply to the long-term investors rather than the cycles that would apply to the trader?

"Answer: Yes."

My question is: Did you give those answers to those questions?

A I did.

Q Were your answers true when you gave them?

THE WITNESS: Your Honor, can I have that question repeated again?

THE COURT: Yes.

(Record read)

A Yes.

THE COURT: All right, we will stop there.

MR. SHAFFER: Could I ask --

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THE COURT: You can ask the next question.

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Q Are they true today?

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A Yes.

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THE COURT: All right.

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MR. SHAFFER: Your Honor, will you go until 2

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or will you go until quarter to 2?

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THE COURT: We will take lunch until 2.

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MR. SHAFFER: Thank you, sir.

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(Luncheon recess)

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1 [555]

deGive - direct

A-425

2 AFTERNOON SESSION

3 2 p.m.

4 P A U L d e G I V E, resumed.

5 DIRECT EXAMINATION (continued)

6 BY MR. SHAFFER:

7 Q Mr. deGive, I want to show you what has been  
8 marked as Plaintiff's Exhibit 32 in evidence. The last  
9 sentence reads: "Accordingly, short intermediate traders  
10 and long-term investors may complete their buying  
11 programs."

12 Do you see that?

13 A Yes.

14 Q What is an intermediate --

15 A Just a moment. May I look at the date of that?

16 Q Yes. It is August 12, 1968.

17 A Yes.

18 Q What is an intermediate trader?

19 A An intermediate trader is a trader who buys  
20 stocks for an intermediate cycle.

21 Q And what is an intermediate cycle?

22 A Six weeks.

23 Q Six weeks?

24 A Yes.

25 Q Or less?

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A Six weeks.

Q Mr. deGive, I want to show you what is marked as Plaintiff's Exhibit 32 in evidence, and that is dated August 12, 1968, and there is a term "Agile traders may take advantage of a rebound in individual issues, but long-term commitments should be deferred until there is more definite evidence of an important bottom formation in the majority of stocks." That is February 20, 1968, but it is attached to Plaintiff's Exhibit 32 in evidence.

A What is your question?

Q Did you see what I read?

A Yes.

Q What is an agile trader, Mr. deGive?

MR. BARIST: Excuse me. May I ask what one you are reading from, please?

MR. SHAFFER: Yes. I am reading from a Comment of February 20, 1968, which is Plaintiff's Exhibit 32 in evidence.

MR. BARIST: You mean this is February 20.

MR. SHAFFER: Yes.

MR. BARIST: A moment ago you identified it as something else.

MR. SHAFFER: The front page was August 12, 1968, but what I just read him is from February 20.



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THE COURT: Off the record.

MR. BARIST: On the record, your Honor, the numbering system seems to have been totally fouled up. We have these down as Plaintiff's 10 in evidence. Now I hear that it is Plaintiff's 32 or 31. We can take care of that in a recess, but I just want to be sure I am following the right exhibit.

MR. SHAFFER: I will show him Plaintiff's 10, your Honor (handing to Mr. Barist).

THE COURT: Next question.

Q Mr. deGive, what is an agile trader?

MR. BARIST: Objection.

THE COURT: Overruled.

THE WITNESS: I didn't hear your answer, your Honor.

THE COURT: Overruled. You may answer it.

THE WITNESS: Oh.

A An agile trader is a person who buys stocks for a very short term period with a limited move.

Q Is there any difference between a trader and an agile trader?

A Point of time.

Q Were you asked this question and did you give this answer, page 243 of your deposition on September 14,

1

2

1972?

3

"Question: Is a short-term trader the same as an agile trader?

4

5

"Answer: A trader is for an intermediate advance or decline.

6

7

"Question: What is the difference between a trader and an agile trader?

8

9

"Answer: I don't see any real difference."

10

Did you give that answer to that question?

11

A Yes, I gave an answer to that question.

12

Q Not an answer. Did you give the answer that I read you to that question?

13

14

A Yes.

15

Q Was the answer true when you gave it?

16

A Yes.

17

Q Is it true today?

18

A Yes.

19

Q At any time during the period that you held my client's account, from 1953 through 1970, did you consider my client's accounts falling in the category of belonging to an agile trader?

20

21

22

23

A No.

24

Q 245 of your deposition.

25

MR. BARIST: Wait one moment, Mr. Shaffer.



MR. SHAFFER: You tell me when to go ahead.

MR. BARIST: Go ahead.

Q Page 245, line 14:

"Question: Yes, but that wasn't the question. The question is, as in the years 1966, 1967 and 1968, is it also true, is it not, that in 1969 and 1970 Mrs. Van Alen could at one moment be an investor and another moment a trader, depending on what the cycles do or do not confirm?

"Answer: Yes."

Did you give that answer to that question?

A I did.

Q Was it true when you gave it?

A Yes.

Q Is it true today?

A Yes.

Q At any time in 1968 did you consider Mrs. Van Alen as an intermediate trader?

A As an intermediate trader?

Q Yes.

A To the best of my recollection I did not.

Q Page 251.

"Question: Mr. deGive, would you listen to the question and answer it yes or no. On or about July 29,



1968, did you regard Mrs. Van Alen as a short-term trader, yes or no?

"Answer: I regarded Mrs. Van Alen as an intermediate trader of a cycle of thirty days."

Did you give that answer to that question?

A I did.

Q Was it true when you gave it?

A It was.

Q Is it true today?

A If the conditions remain the same, it's true today.

Q I mean, is your answer true today?

A For the purpose of purchasing securities, I would buy at an intermediate bottom.

Q I just want to know: Was the answer you gave, that I just read to you from page 251 of your transcript, which you said was true when you gave it, is it true today?

A I did not regard Mrs. Van Alen as an intermediate trader in that sense.

Q Then your answer is not true today?

A In reviewing that testimony, I have to say it is true today with reservations.

Q Without reservations it is not true today?



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A No.

Q Without reservations it is not true when you gave it?

A I should have said buying securities for an intermediate advance.

Q I ask you if it is not true when you gave it.

MR. BARIST: Your Honor, I think he has a right to answer that question.

THE COURT: No, it is really a simple question. It calls for a simple answer, it seems to me. Please answer the question.

THE WITNESS: Would you ask the question again, please.

MR. SHAFFER: Please read the question.

(Record read)

Q Without reservations it is not true when you gave it, is it?

A That question without reservations is not true when I gave it.

Q Is it true that what a short-term trader needs for a confirmed buy signal is the seven-, the ten-, the twelve-, and the thirty-day cycle?

A Not necessarily.

Q Did you give this answer to this question,

reading from page 256 of Mr. deGive's deposition, line 14?

"Question: Now to recap that, what the short-term trader needs is the seven- and ten-, the twelve-, and the thirty-day cycle, all to confirm the buy signal?

"Answer: Yes."

Did you give that answer to that question when you were deposed?

A Yes, I did, and I will connect the previous statement.

Q I just want to know about this one now.

A Yes, I gave that statement, yes.

Q And was it true when you gave it?

A It was.

Q And is it true today?

A Yes.

Your Honor, I would like to correct the statement previous.

MR. SHAFFER: Can we do that on redirect, Judge, or do you want to do it now?

THE COURT: No, leave it for redirect. Mr. Barist will handle it.

MR. SHAFFER: Thank you, Judge.

Q Is it true that the short-term trader does not need a confirmation of the buy signal by the sixty-day



1  
2 signal?

3 A I would think he would have to have some  
4 confirmation but not necessarily.

5 Q Did you give this answer to this question,  
6 page 256?

7 "Question: Now, to recap that, what the short-term  
8 trader needs is the seven- and ten-, twelve- and the  
9 thirty-day cycle, all to confirm the buy signal?

10 "Answer: Yes.

11 "Question: But not the sixty-day signal, he does  
12 not require that, is that correct?

13 "Answer: Correct."

14 Did you give that answer to that question?

15 A I did.

16 Q Was it true when you gave it?

17 A Yes, it was.

18 Q Is it true today?

19 A I said not necessarily.

20 Q When you were buying for Mrs. Van Alen, did  
21 you require a confirmation by the sixty-day signal?

22 A Yes.

23 Q Was that true when you were buying for her in  
24 an intermediate oversold condition of the market?

25 A I required a favorable --

1 [564] deGive - direct A-434  
2 Q I just want to know: Did you require the sixty-  
3 day signal?

4 A I required the sixty-day signal.

5 Q Did you require the sixty-day signal from Mrs.  
6 Van Alen when you made a purchase for her as an inter-  
7 mediate trader of a cycle of thirty days?

8 MR. BARIST: Objection, your Honor. It assumes  
9 facts not in evidence. She assumed the buying --

10 MR. SHAFFER: He already testified he did,  
11 Judge.

12 MR. BARIST: I don't believe he did. He said  
13 he regarded her as an intermediate trader during a cycle  
14 of thirty days with reservations.

15 MR. SHAFFER: Right.

16 THE COURT: Overruled.

17 Q Go ahead and answer the question.

18 A When I purchased stocks from Mrs. Van Alen,  
19 on an intermediate basis, it was I considered all of  
20 the indicators.

21 Q Including the sixty-day?

22 A Including the sixty-day.

23 Q When you bought stocks for somebody else on an  
24 intermediate cycle of thirty days, did you also require  
25 confirmation of the buy signal by the sixty-day material?



1 [565] deGive - direct A-435  
2 MR. BARIST: Objection. I am not certain I see  
3 what relevance, what he did for somebody else, has at  
4 this point.

5 MR. SHAFFER: Your Honor, we are in the same  
6 category of traders now. I want to point out eventually  
7 what the difference is.

8 MR. BARIST: I think it is --

9 THE COURT: Sustained.

10 Q Would you require a confirmation of the buy  
11 signal by the sixty-day material for everybody you were  
12 buying on the intermediate thirty-day cycle irrespective  
13 of identity?

14 MR. BARIST: Objection.

15 THE COURT: Sustained.

16 Q When you were buying stocks on an intermediate  
17 cycle of thirty days for a purchaser, would you require  
18 the buy signal to be confirmed by the sixty-day material?

19 MR. BARIST: Objection.

20 THE COURT: Sustained.

21 Q Did you buy stocks for Mrs. Van Alen during the  
22 term that you acted for her accounts for an intermediate  
23 advance?

24 A I bought stocks for Mrs. Van Alen on intermediate  
25 signals if the long-term material confirmed the intermediate

advance.

Q What is the long-term material?

A Sixty days. Was giving a favorable signal.

Q Is that true in 1969 and 1970?

A Yes.

Q Was it true in the other year, 1953 to 1968?

A Yes.

MR. SHAFFER: Your Honor, to move ahead into another area, I would like to get some exhibits out, so that we will move along. I call Mr. Barist's attention to Defendants' Exhibit for identification 117, Defendants' Exhibit for identification 121, Defendants' Exhibit for identification 159, Defendants' Exhibit for identification 183, 209, 196 and 168. And those are charts that relate to the year 1969.

I also call his attention to Defendants' Exhibit No. 117 again, which was the scroll that carries through from year to year, Defendants' Exhibit for identification 122, 160, 184, 210, 197, and 169.

MR. BARIST: And that relates to 1970?

MR. SHAFFER: And that relates to 1970 charts.

I am also at this time calling your attention again to the scroll, which is 117 for identification, defendants' exhibit, and to Defendants' Exhibits No. 120,



158, 182, 208, 195 --

MR. BARIST: Hold it. Mr. Shaffer, that fast I am not.

MR. SHAFFER: Excuse me. 117, 120, 158, 182, 208, 195, and 167. And they relate to the year 1968.

And the last year to which I shall refer is the year 1967. Again we have the scroll which is 117 for identification, defendants' exhibit, and the following exhibits: 119, 157, 181, 207, 194, and 166.

MR. BARIST: 1967?

MR. SHAFFER: And they relate to 1967. For the convenience of the Court I would like the Court to know that it is my understanding that these three years and the charts for each of the three years are the same excepting they relate to different years.

Mr. Barist, may I have your permission to use your chart?

MR. BARIST: You may have. Tell me which one you want this time.

MR. SHAFFER: The 170.

MR. BARIST: Please.

MR. SHAFFER: I just don't want to go into your records without your permission.

MR. BARIST: We will get the rest of the charts

out for you when you want them.

MR. SHAFFER: If you would get me the charts for the year 1969, which would be 121, 159, and 183, 209, 196 and 268, it would help.

THE COURT: Whose markings are we going to use as these charts are used?

MR. SHAFFER: Your Honor, I would be happy to put them in as plaintiff's exhibits.

THE COURT: What is your wish, Mr. Barist?

MR. BARIST: I think if he is putting them in, they ought to have his exhibit numbers on them.

THE COURT: All right. Then there is agreement. You will use them, you will assign your own number.

MR. SHAFFER: My number, Mr. Kamerman?

MR. KAMERMAN: 35.

Q Mr. deGive, I want to show you your chart which up to this point has been marked as Defendants' Exhibit for identification No. 117 and it is the large control chart.

MR. SHAFFER: And I would like you to look at it and from this time on, your Honor, I will refer to it as proposed Plaintiff's Exhibit No. 35.

Q Do you recognize it?



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A I do.

Q Is it your chart?

A It is.

Q Have you prepared it?

A I did.

Q Have you prepared it over the years by adding material to it periodically?

A I or my secretary.

Q Yes. Under your supervision?

A Yes.

Q Is that one of the charts you used in employing your system?

A It is.

Q Does it cover the years 1969 and 1970 in the complaint period? Forget the complaint period. Does it cover the years 1969 and 1970?

A Part of 1970.

Q What part? Up through March of 1970?

MR. BARIST: We will concede that it does.

MR. SHAFFER: All right, it is conceded, Judge.

A Yes.

Q If you later find out that is wrong, you can tell us, but it is conceded.

MR. SHAFFER: I offer it in evidence.

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MR. BARIST: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 35 received in evidence.)

MR. SHAFFER: Now I would like to ask Mr. Barist if he would give me Defendants' Exhibits for identification 121, 159, 183, 209, 196, and 168.

MR. BARIST: Do you have those, Mr. Bilus?

MR. SHAFFER: If Mr. Bilus gives them to me, we can move along.

MR. BARIST: I just want to see them before we give them to you, so I have a record. Will you tell me what numbers they will be.

MR. SHAFFER: I am next going to deal with Defendants' Exhibit for identification 121, and I hope it to become Plaintiff's Exhibit in evidence No. 36.

MR. BARIST: If you wish to offer these charts, I have no objection.

MR. SHAFFER: All right, fine.

MR. BARIST: If that will save any time.

MR. SHAFFER: It will, and I appreciate the offer.

Your Honor, I am going to offer in evidence Plaintiff's Exhibits 35 -- which is done -- 36, 37, which will be converted from Defendants' Exhibit for



1 identification 159.

xxx

(Plaintiff's Exhibit 36 received in evidence.)

2 MR. BARIST: Excuse me, Mr. Shaffer. Is

3 Plaintiff's 36 Defendants' 121 now in?

4 MR. SHAFFER: It is.

5 MR. BARIST: Thank you.

6 MR. SHAFFER: The next one, your Honor, 37, will  
7 come from Defendants' Exhibit for identification 159;  
8 Plaintiff's Exhibit 38 will be the new number converting  
9 Defendants' Exhibit 183 for identification. Defendants'  
10 Exhibit 209 for identification will become Plaintiff's  
11 Exhibit 39. Defendants' Exhibit 196 will become  
12 Plaintiff's Exhibit 40. Defendants' Exhibit 168 will  
13 become Plaintiff's Exhibit 41.

14 I offer them all in evidence.

15 THE COURT: No objection. Received.

xxx

(Plaintiff's Exhibit 37 through 41 received in evidence.)

16 MR. BARIST: I have not been following as fast

17 as Mr. Shaffer has been reading, your Honor. Can I  
18 just make a note of those numbers.

19 (Pause)

20 MR. SHAFFER: Your Honor, to move things along  
21 even quicker, perhaps, with these exhibits, I have made  
22 an arrangement with Mr. Barist, which, if you will  
23 approve, will be as follows: Defendants' Exhibit No. 122  
24 for identification, 160 for identification, 184 for  
25

1 identification, 210 for identification, 197 for  
2 identification, and 169 for identification, which are  
3 the corresponding documents for the year 1970, will  
4 become Plaintiff's Exhibit Nos. 42, 43, 44, 45, 46 and  
5 47, respectively. I offer them in evidence.  
6

7 THE COURT: No objection? Received.

8 (Plaintiff's Exhibits 42 through 47 received in  
9 evidence.)

10 MR. SHAFFER: Lastly, your Honor, with respect  
11 to the year 19 -- I take back the "lastly" -- with  
12 respect to the year 1968, I am going to offer Defendants'  
13 Exhibit No. 120 for identification, 158, 182, 208, 195  
14 and 167, as Plaintiff's Exhibits 48, 49, 50, 51, 52, 53,  
15 respectively --

16 MR. BARIST: Excuse me. You are out of sequence,  
17 then, because you don't have enough defendants' numbers to  
18 go to 53.

19 MR. SHAFFER: I have Defendants' Exhibit 167  
20 for identification for 53.

21 MR. BARIST: Will you read them again to me,  
22 then, sir?

23 MR. SHAFFER: Yes.

24 MR. BARIST: Beginning with the first 1968  
25 exhibit.

XXX



1                   [573]                   deGive - direct                   A-443  
2                   MR. SHAFFER: Yes, sir. Defendants' Exhibit 120  
3                   for identification will be 48, Plaintiff's 48; Defendants'  
4                   158 for identification will be Plaintiff's Exhibit 49;  
5                   Defendants' Exhibit 182 for identification will be  
6                   Plaintiff's Exhibit 50; Defendants' Exhibit 208 for  
7                   identification will be Plaintiff's Exhibit 51; Defendants'  
8                   Exhibit 195 for identification will be Plaintiff's  
9                   Exhibit 52; and lastly Defendants' Exhibit 167 for  
10                  identification, which is the DJ Industrial 1968 chart,  
11                  will be Defendants' Exhibit 53 in evidence. I am going  
12                  to offer those in evidence now, your Honor, and if there  
13                  is no objection and you receive them, I will know they  
14                  are in evidence.

15                  MR. BARIST: No objection.

16                  THE COURT: Received.

17                  (Plaintiff's Exhibits 48 through 53 received  
18                  in evidence.)

19                  THE COURT: Before you proceed, what years do  
20                  those exhibits P35 to P41 pertain to?

21                  THE WITNESS: Those, your Honor, pertain to 1969.

22                  THE COURT: And then 42?

23                  MR. SHAFFER: 42 through 47 pertain to 1970.

24                  THE COURT: And then the balance 1968.

25                  MR. SHAFFER: Correct, your Honor.

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THE COURT: All right.

MR. SHAFFER: The last year involved, your Honor, is 1967, and we have the same line of exhibits, and they are now numbered as Defendant for identification 119, 157, 181, 207, 194, and 166. And I hope to mark them as Plaintiff's Exhibits 54, 55, 56, 57, 58, 59, respectively, and I am going to offer them in evidence, and if they are received --

THE COURT: Wait. No objection?

MR. BARIST: No objection.

THE COURT: Received.

(Plaintiff's Exhibits 54 through 59 received in evidence.)

MR. SHAFFER: Then, your Honor, so that you follow the testimony, 35 is used in each of these years because it is a scroll-type chart that covers multiple years.

THE COURT: All right.

MR. SHAFFER: And the other exhibits are only used in years under their designation.

THE COURT: All right.

MR. SHAFFER: And I am going to represent to the Court, in the presence of Mr. Barist, what each of these exhibits is, and subject to my being proven wrong,

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perhaps it will move it along and we can then go to the witness, so he does not have to be burdened going through what each one of these is and then we can get the testimony.

THE COURT: All right.

MR. SHAFFER: In the series of 36 through 41, Mr. Barist, I represent to you that it is my understanding that Plaintiff's Exhibit 36, which was your Defendant 121 for identification, is Mr. deGive's chart for the year 1968, which contains information involving daily advancing divided by daily declining.

MR. BARIST: No.

MR. SHAFFER: You don't want to do it that way?

MR. BARIST: No. We have given these charts certain names on our exhibit list.

MR. SHAFFER: What name do you call it?

MR. BARIST: Which one are you referring to?

MR. SHAFFER: With regard to 36, which is the chart Mr. deGive prepared for the year 1969.

MR. BARIST: 121 is described as 1969 technical chart prepared by deGive with red, blue and green lines and penciled lines on it.

MR. SHAFFER: I accept that. I would like to tell you that I think you will agree with me that



Exhibit 37, which was your Defendant 159 for identification, is Lowry's 1969 chart.

MR. BARIST: Correct.

MR. SHAFFER: And Exhibit 38, which was your Defendant 183, is the Dow Jones Industrial Average chart for 1969 prepared by Mr. deGive.

MR. BARIST: No, it is technical chart relating to Dow Jones Industrial Average in 1969.

MR. SHAFFER: I accept that, I accept that.

MR. BARIST: Mr. Shaffer, with all deference, it does not seem to me that either your characterization or my characterization helps this trial very much. I tried to label these things as best as I understood them in the exhibit list as flat and as neutral a way as I knew how. I think the only way of getting across what these charts are is from Mr. deGive.

MR. SHAFFER: I agree.

MR. BARIST: This is one of the reasons I could not stipulate as to what is on these charts, because quite frankly I have to go back and look at my notes to make certain that I have not made a mistake as to various formulas arrived.

MR. SHAFFER: But I do suggest and submit, your Honor, that it is helpful to know whether we are



1 talking about a DJ Utility chart or a DJ Railroad  
2 Average chart.  
3

4 THE COURT: Because you can use Mr. Barist's  
5 description.

6 MR. SHAFFER: That is what I am trying to do,  
7 yes. I adopt them and accept them.

8 MR. BARIST: Since those descriptions are in  
9 my exhibit list annexed to the pretrial order, I think  
10 Mr. Shaffer and myself and your Honor, if he wishes, can  
11 use the same designation to talk about the same pieces of  
12 paper.

13 MR. SHAFFER: That is what I would like to do.

14 THE COURT: All right.

15 MR. SHAFFER: And I would like to say them  
16 now, so the record reflects them.

17 MR. BARIST: I don't see any need to do it.

18 MR. SHAFFER: I would like to do it. If his  
19 Honor lets me, I would like to do it.

20 MR. BARIST: It is up to his Honor if he wants  
21 to read my exhibit list.

22 MR. SHAFFER: Yes. Your Honor, it is a base form-  
23 ation point from which we can move forward. I think it is  
24 helpful.

25 THE COURT: Yes, but what I suggest you do is



1 take overnight the defendants' index or make your own  
2 and take their brief descriptions and add the new  
3 plaintiff's markings and then offer them into evidence,  
4 I gather where they can be received without objection,  
5 become part of the record and receive the same thing.  
6

7 MR. SHAFFER: They are received now, your Honor.

8 THE COURT: They are received, but these  
9 descriptions which you wish to put in the record you can  
10 do in this other fashion. I would appreciate having a  
11 conversion alongside the defendants' markings as well.

12 MR. SHAFFER: All right. Your Honor, not just to  
13 do something a third way, may I ask that I continue my  
14 examination of this witness by showing him these charts  
15 and asking him what he calls them, and then taking his  
16 testimony? That would avoid doing what your Honor  
17 suggested. I was just trying to do it another way. Is  
18 that all right with you?

19 MR. BARIST: Your Honor, he can call them Pat and  
20 Mike and it doesn't make any difference.

21 THE COURT: Yes, it seems that way to me.  
22 Whatever you call them, give them a number.

23 MR. BARIST: That is why we gave them numbers.

24 THE COURT: You have the numbers. Ask him the  
25 questions.



1 [579] deGive - direct A-449  
2 MR. BARIST: Some of our exhibits are already  
3 on your table, are they not?

4 MR. KAMERMAN: No, those are our Xeroxes.

5 MR. SHAFFER: Which exhibits do you want? I  
6 would like 38, 39, 40 and 41 in evidence, which were your  
7 121, 159, 183, 209, 196, and 168.

8 THE COURT: I do think that there is an  
9 advantage to colloquy in all of this respect  
10 between counsel being off the record, and it  
11 must be a terrible record now, in terms of clarity. If  
12 that is satisfactory, why don't you go to his table, Mr.  
13 Shaffer, and buzz in his ear and tell him what you want  
14 and then Mr. Cohen won't have to take all that down on  
15 the record needlessly.

16 MR. SHAFFER: Yes, sir.

17 (Conference between counsel.)

18 MR. SHAFFER: Your Honor, I have followed your  
19 suggestion. It has worked. I have the chart, and I am  
20 going to show it to the witness.

21 Q Mr. deGive, I want to show you Plaintiff's  
22 Exhibit 36 in evidence, which was Defendants' 121 for  
23 identification, and ask you, is that a chart that you  
24 prepared covering the year 1968 --

25 MR. KAMERMAN: '69.

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Q 1969.

A Yes.

Q On that chart would you tell his Honor what signals or oscillators you plotted.

A I plotted a red line, which is a twelve-day moving average; a blue line, which is a thirty-day moving average; a green line, which is a fifty-five sixty moving average.

THE COURT: Did you use the same colors for the same things on all the charts?

THE WITNESS: Your Honor, they are not the same moving averages.

THE COURT: So the colors mean different things on different charts?

THE WITNESS: That is correct.

Q On your chart which you have just described, how many buying indicators are there?

A There are three indicators on that chart. They are not buying indicators.

Q They are not buying?

A They are indicators.

Q There are three indicators on the chart, all right. Tell his Honor what those three indicators are.

A The twelve-day --



MR. BARIST: I thought it was just asked and answered, your Honor.

MR. SHAFER: I just want to be sure I have it from the chart.

MR. BARIST: I still object. It is asked and answered.

THE COURT: I am going to take it because I did not get it the first time.

A The twelve-day is a moving average between shares or volume of stocks ending up divided by shares or volume of stocks ending down, each day, twelve days of that, as a ratio.

Q Is that ratio expressed in a line?

A Expressed in a red line.

Q Does that red line indicate generally when the ratio is moving upwards as well as when the ratio is moving downwards?

A The relationship, yes.

Q Generally when that red line moves up, is it fair to say that prices are going up?

A Not necessarily.

Q What is your next line?

A The next line is a blue line. That is a thirty-day ratio of volume of stocks ending up, divided

by a volume of stocks ending down, each day for thirty days.

Q And if that ratio moves up the line moves up, and if it moves down, the ratio moves down?

A Yes.

Q Generally, when that line moves up, does it mean that the prices are moving up?

A There are exceptions, but generally.

Q The third line on that chart is sixty-day material?

A Fifty-five sixty.

Q What is the color of that one?

A That is green.

THE COURT: Is it a ratio?

THE WITNESS: That is a ratio of buying line divided by a selling line.

Q Is the line that you are just describing drawn from information that you obtained from the Lowry Service that you testified to?

A Yes.

Q Generally, with exceptions, when that line is moving up, can we say that prices are going up?

A There are exceptions.

Q I say with exceptions is that a true statement?



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A Yes.

Q And the converse, when it is moving down, with exceptions, prices are moving down.

A Yes.

Q Those three lines are indicators, isn't that so, among your group of indicators?

A Yes.

Q Generally in your system how many indicators are there for buy signals and how many indicators are there -- I won't make it compound -- how many indicators are there for buy signals in your system, from all the material that you have in these years? Let us say for 1969. For the year 1969, when you were employing your system, generally how many buy indicators are there in all the material you had?

A There are three buying indicators on the chart.

Q No, I don't mean that, sir. I mean in all of your charts, as you used them in 1968.

MR. KAMERMAN: 1969.

Q 1969, sorry. How many buy indicators were there, if you know, approximately?

A Ten on the market as a whole.

Q Does that mean ten buying as opposed to ten selling, or ten altogether?

A Ten altogether for buying and selling, that is, for the market as a whole.

Q What does that mean, "for the market as a whole"? What does the qualification "as a whole" mean?

A This material is based on the total market of stocks traded on the New York Stock Exchange.

Q Have you completed your answer? I did not hear you, sir. Have you completed your answer?

A Yes.

Q Of the indicators you have just mentioned, are three of them on the chart we have just been discussing?

A Yes.

Q Now I want to show you what is Exhibit No. 37 in evidence, and it was Defendants' Exhibit 21 for identification -- Plaintiff's Exhibit 21 for identification.

MR. BARIST: Defendants' 151.

MR. SHAFFER: Excuse me, 159 for identification.

MR. BARIST: Mr. Shaffer, may I make a suggestion?

(Conference between counsel)

Q -- and ask you, is that the Lowry chart for the year 1969 that you just mentioned?

A It is.

Q Is that a chart that you make day to day



additions to or periodically additions to?

A Day to day.

Q Day to day.

A Not this particular chart but a chart of the same type, only larger. This chart is sent at the end of the year --

Q I see.

A -- to combine all of the periodic charts for that year, and as a record to be kept.

Q And just so I understand it, your chart at the end of the year does or should look like that chart that you have there, that is, the charts that you make the Lowry additions to?

A Just to make it clear: From time to time Lowry sends charts that have a record of the past and with enough space to add the current record on to it.

Q I see.

A And after it is completed on that unit, then a new one is sent to you, and you either keep or discard the old one.

Q Right.

A At the end of the year they send you one of these for the yearly record.

Q Which is the complete chart?

1 A Yes.

2 Q And is it that information on that chart that  
3 the green line of the chart before is plotted?  
4

5 A Yes, sir.

6 Q Thank you. Now I want to show you a chart --  
7 withdrawn.

8 Do you have any buy or sell signals on that chart,  
9 the Lowry chart?

10 A Both the buying line and the selling line are  
11 considered when getting buying and selling signals.

12 Q And those lines --

13 A Did you understand that, your Honor?

14 MR. SHAFFER: I will make it clear, Judge.

15 THE COURT: I am not sure what the answer was  
16 to your question. Was the answer yes?

17 MR. SHAFFER: Yes, it was, your Honor.

18 Q On the chart you have before you, the Lowry  
19 chart --

20 A Yes.

21 Q -- are there indicators on that chart in your  
22 system?

23 A Yes, they are.

24 Q How many?

25 A I use the buying indicator and the selling



indicator on this chart.

Q So there would be two on that chart for your system?

A Yes.

Q Those two are expressed in lines, is that not so?

A Described as buying power and --

Q Selling power?

A Buying pressure and selling pressure.

Q Buying pressure and selling pressure. When the buying pressure line is moved up, is it fair to say, with some exceptions, that prices are moving up?

A It is fair to say that the ratio -- that the amount of buying in the market is improving. Prices may not be moving up.

Q And the selling pressure line is -- when that moves up, is it fair to say that selling pressure moves up?

A Yes.

Q Is it also fair to say that as a general rule prices are moving down?

A No.

Q Is that sometimes true?

A Sometimes.



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Q What is the third line on that chart?

3

A On this chart?

4

Q On the Lowry chart.

5

A There are --

6

7

Q I mean expressing a ratio. Is there a third line expressing a ratio on that chart, like the buying pressure line and the selling pressure line?

8

9

A There are other indexes on that chart.

10

11

Q Which you do not consider in your system as signals.

12

A No.

13

Q Would you say correct to that or incorrect?

14

A Correct.

15

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18

Q And so that the record is clear, the two lines that express the signal are the heavier red line and the heavier black line, as opposed to other red and black lines on that chart?

19

A That is correct.

20

21

MR. SHAFFER: Would your Honor like to look at that chart now?

22

THE COURT: No. I have one here.

23

24

25

Q Showing you what had been Defendants' Exhibit 138 for identification and which is now 38 in evidence, is this a chart containing signals you utilized in your



system in the year 1969?

A Yes.

Q Are there ratios expressed on that chart in the form of oscillating lines?

A They are.

Q How many lines are there on that chart, of the kind I just mentioned?

A There are three oscillators on that chart.

Q Do those three oscillators contain the information from which signals are given to you in the employment of your system?

A Yes.

Q Are there any other signals given to you by information on that chart that are not in the three oscillating lines?

A Would you repeat that question, please?

MR. SHAFFER: Mr. Reporter, would you read the question, please.

THE COURT: Are there any other signals on that chart which are not reflected by the three lines? Is that the question?

MR. SHAFFER: Yes, your Honor.

A No.

Q What are the three lines that are expressed in



the form of oscillating lines on that chart?

A The red line is a six weeks moving average index. The blue line with dots and dashes is a three months moving average index. The solid line is a six months or twenty-four weeks. The three months is twelve weeks, your Honor. These charts are calculated on a weekly basis.

Q What is the first moving average that you mentioned?

A Six weeks.

Q And that is a moving average of what?

A Six weeks. Oh, each week the volume in the Dow Jones Industrial Average of stocks if the market ends up that week it is a plus. If the market ends down that week, the volume in the Dow Jones Industrial Average times the price movement in both cases, it is a minus.

Q Generally --

A The index is derived by dividing the minus portion into the plus portion over a six weeks period.

Q What is the next average?

A The next dotted dash is three months or twelve weeks.

Q Is it the same material put into a twelve



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weeks average?

A That is correct.

Q What is the next oscillating line?

A Six months or twenty-four weeks of the same material.

Q Did you say six months or twenty-four weeks as interchangeable terms?

A Actually this material is calculated on a weekly basis and it is twenty-four weeks, and the three months is twelve weeks. And I described them as six months, three months and six weeks, rather than one and a half months.

Q Ordinarily in twenty-four weeks of plotting we would have run six months on the calendar, approximately.

A Well, there are extra weeks. But this material is computed on a weekly basis.

Q Is it fair to say that when the red line moves up, the market is moving up?

MR. BARIST: Objection to the form; also been asked and answered.

MR. SHAFFER: Not as to this, I don't think. Let me ask this question:

Q When the red line moves up, does it generally indicate more stocks by price and volume are moving up than stocks by price and volume are moving down?



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A It indicates an improvement in that ratio.

Q And the same with the black line material, which is the six months material or twenty-four week material?

A Yes. And the twelve weeks.

Q Right. How many indicators to buy are shown on that chart?

Let me rephrase it and withdraw the question.

How many indicators on that chart do you consult when you are looking for a buy signal?

A Primarily the six weeks indicator.

Q So that would be one, right? Speak so we get it on the record, Mr. deGive. Would that be one?

A Yes.

Q How many indicators on that chart do you consult when you are looking for a sell signal?

A The six weeks and the twenty-four weeks.

Q Well, that would be two, is that right?

A Yes.

Q Now I am going to show you what had been 196 for identification, Defendants' Exhibit -- I take that back -- Defendants' Exhibit 209 for identification, which now is Plaintiff's Exhibit 39 in evidence, and ask you if this is one of the charts utilized in your system



1 [593]

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2 in the year 1969.

3 A That is correct.

4 Q Does that chart relate to Railroad Average  
5 material in the Dow Jones Average of railroad  
6 information?

7 A No.

8 Q What does it relate to?

9 A Dow Jones Utility Average.

10 Q So it relates to utility. How many oscillators  
11 are on that chart?

12 A Two.

13 Q What do they oscillate, what information?

14 A The same calculations. The red line is a  
15 six weeks moving average, and the black line is a  
16 twenty-four weeks moving average of calculations similar  
17 to the previous chart on the Utility Average index.

18 Q Therefore when the red line moves up, it  
19 indicates that that ratio, that is, more stocks by price  
20 and volume being considered on that chart, are moving up  
21 than stocks by price and volume are moving down.

22 A The ratio is improving.

23 Q What is the other indicator on that chart?

24 A Twenty-four weeks.

25 Q On that chart how many indicators do you consult



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when making a buy?

3

A Six weeks.

4

Q So that is one, right?

5

A Yes.

6

Q How many do you consult when you are looking for

7

a sell signal?

8

A The six weeks and the twenty-four weeks.

9

Q And that is two, is it?

10

A Yes.

11

Q Now I want to show you what has been marked as

12

Plaintiff's Exhibit No. 40, which was Defendants' Exhibit

13

196 for identification, and ask you is that a chart that

14

you utilized in your system in 1969 relating to information

15

concerning the Railroad Average of Dow Jones material.

16

A Yes.

17

THE COURT: Still 1969?

18

MR. SHAFFER: Yes, your Honor.

19

Q How many oscillating lines are there?

20

A Two.

21

Q What is their color?

22

A There is a six weeks moving average and there

23

is a twenty-four weeks.

24

Q Yes. I say what color?

25

A Red is the six weeks moving average, and the



black solid is a twenty-four weeks.

Q Do those lines express the moving average of points on the upside of railroad stock times volume divided by points on the minus side of railroad stocks times volume in stocks composing the average over a given period of time?

A In that average.

Q When those two lines that you have testified to exist on that chart move up, does it generally signify that the points of stocks times volume for the period involved is greater than the points of stock times volume of those declining?

A The ratio of the index is improving.

Q I want to ask you this question and ask you did you give this answer. This is in your deposition on October 30, 1972.

MR. SHAFFER: At page 340, Mr. Barist, beginning at line No. 7.

MR. BARIST: I will be with you in a second.

Q I will start at line No. 3 so that it is intelligible to you.

"Question: What is the meaning of the black line on Exhibit 26?

"Answer: That is a six-month moving average of the



same material.

"Question: When those two lines are moving up, does that signify that the points of stocks times the volume for that period that you are working with, of those advancing, is greater than the points of stocks times the volume of those declining?

"Answer: Yes."

Did you give that answer?

A I gave that answer.

Q Was it true?

A When the index is down low, it will --

Q Just a second. You gave the answer.

A I gave that answer.

Q Was it true when you gave it?

A No, it was not true.

Q Is it true today?

A No.

Q In fairness to you, tell his Honor why there should be some change in your answer.

A Because when the dotted red line is below one, the volume of stocks advancing times the points will not be greater than the volume of stocks declining.

The volume of stocks that are declining times volume will be greater than the stocks advancing if the



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index is below one.

Q Have you completed your answer?

A When the ratio advances, it indicates that the volume of stocks times points advancing is improving over the volume of stocks times points declining. The index is improving, the relationship is improving.

Q Is it fair to say that the average price of railroad stocks in the average is going up as the oscillator showing the advances goes up?

A Not always.

Q But sometimes?

A Yes.

Q And conversely is it fair to say, with exceptions, that when the oscillator goes down, prices are going down?

A No.

Q OK.

A Sometimes.

Q How many oscillators are on that chart that you consult?

A Two.

Q One is black and one is red?

A That is correct.

Q What is the black line?

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A The black line is the twenty-four weeks moving average. The red line is a six weeks moving average of that ratio.

Q How many indicators with respect to buy signals and sell signals as a total are on that chart?

A The two.

Q And with respect to buy indicators --

A I --

Q What?

A I wish you would rephrase that question.

Q I will withdraw it and we will strike your answer if the Court will let me.

THE COURT: Yes.

Q How many total indicators are shown on that chart?

A Two.

Q How many buy indicators do you consult when you are looking for a buy signal on that chart?

A One.

Q How many sell indicators are shown on that chart?

A Two.

Q How many sell indicators do you consult in finding a sell signal in that chart, from information on



1 [599] deGive - direct

2 that chart?

3 A I thought I answered that.

4 Q Well, answer it again, please.

5 A In looking for a sell signal, I consult the  
6 six weeks and the six months -- twenty-four weeks, both.

7 Q In looking for a volume you only consult one?

8 A That is correct. The six weeks.

9 Q And that one being the six weeks.

10 Now I want to show you Defendants' Exhibit 168 for  
11 identification, which is now Plaintiff's Exhibit No. 41  
12 in evidence, and ask you --

13 THE COURT: Before you go into that, we will  
14 stop and take a break of ten minutes or so.

15 (Recess)

16 THE COURT: Step up, sir. We will resume. You  
17 are still under oath.

18 MR. SHAFFER: Your Honor, I would like to locate  
19 the chart that relates to the 1969 Industrials. It is  
20 Defendants' Exhibit 168 for identification and 41 in  
21 evidence.

22 Q Do you have that chart?

23 A Yes.

24 Q Mr. deGive, is that one of the charts that you  
25 used in your system in 1969?



1 [600] deGiv - direct

2 A Yes.

3 Q What does that chart relate to? Dow Jones  
4 Industrial figures?

5 A Industrial Average figures.

6 Q Is that raw material? Have you referred to that  
7 chart as containing the raw material from which Exhibit 38  
8 in evidence or Defendants' Exhibit 183, the DJI Industrial  
9 Average chart is taken?

10 A Would you repeat that question.

11 Q Yes. The chart that you --

12 A You asked me three things in that question.

13 Q The chart that you have in your hand, does that  
14 contain raw figures?

15 A It contains three indexes.

16 Q How does that chart differ from the DJI  
17 Industrial Average for the year 1969, which is  
18 Defendants' Exhibit 138 for identification and 38 in  
19 evidence, which is before you?

20 A What exhibit numbers are those?

21 Q I would like you to look at the industrial  
22 average chart in that group of charts and the chart you  
23 have in your hand.

24 A I am looking at the chart I have in my hand.

25 Q What chart is that?



1 [601] deGive - direct

2 A It says Exhibit 183.

3 Q And that is the Industrial Average chart, isn't  
4 it?

5 A That is a chart of the indices for the  
6 industrial averages.

7 Q Do you have before you up there a chart which  
8 has a sticker on it with the marking "Defendant 168"?

9 A I don't see it.

10 Q I show you a chart, Mr. deGive, which is  
11 Defendants' Exhibit 168 for identification. That relates  
12 to your 1969 and it has been received in evidence as  
13 Plaintiff's Exhibit 41, and I ask you, is that a chart  
14 that you used in your system for the year 1969?

15 A It is a chart of the raw figures that I use in  
16 my system.

17 Q And the raw figures are transposed to another  
18 chart in the group you have before you?

19 A As well.

20 Q Does that chart that you have in your hand,  
21 Exhibit 41, relate to stocks in the Dow Jones Industrial  
22 Average?

23 A Yes.

24 Q Are there any oscillators on that chart?

25 A There are four oscillators on that chart, your

1 Honor.

2 Q What are each of the four oscillators? What is  
3 the first one?

4 A In the bottom, in the lower part of the chart,  
5 there is a dotted black line.

6 Q Which oscillates?

7 A Which oscillates.

8 Q What does it oscillate?

9 A That is volume times price movement of stocks  
10 that -- if the industrial average ends up that week for  
11 six weeks. The dotted red line is volume times price  
12 change of the industrial average if it ends down that  
13 week. Both six weeks moving averages.

14 In the upper part of the chart there is a solid  
15 black line, which is twenty-four weeks of the volume in  
16 the Dow Jones Industrial Average times point change if  
17 it ends up. And the red line is twenty-four weeks moving  
18 average of the volume times price change if the market  
19 ends down -- excuse me -- if the Dow Jones Industrial  
20 Averages end down.

21 Q And it being a twenty-four week moving average,  
22 you divide that by 120, right, 120 days, in your formula?

23 A Twenty-four weeks would be 120 days.

24 Q Now --



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A These are weekly figures.

Q Do you look at the upper part of the chart or the lower part of the chart in determining buy and sell signals?

A In determining buying signals.

Q I just want to know: the upper or lower part?

MR. BARIST: Excuse me, your Honor. I think there is a question outstanding which the witness was about to answer.

MR. SHAFFER: I withdraw the question and place another one.

Q Do you look at the upper or lower part in determining buy and sell signals?

A I look at the lower part generally in determining buying signals, and I look at the upper part generally and the lower part in determining sell signals.

Q How many sell signals are shown on that chart?

MR. BARIST: Objection to the form.

Q When you are looking for a sell signal, how many indicators do you look at on that chart? Just a number, please.

A Four.

Q What four oscillators do you look at?

A The four that are on here.

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Q In determining buy signals, how many oscillators do you look at?

A I look at two.

Q Which two?

A The six weeks material is of primary importance.

Q All right.

A The twenty-four weeks is of secondary importance.

Q Would you ever get a signal from the twenty-four week material which you would look for confirmation elsewhere in a buy?

A Repeat that question.

(Question read)

A I don't understand that question.

Q Don't answer it, then.

As a general matter, in looking at all your material for a year, all the places that you get buy signals, all the places that you get sell signals, in other words all your indicators, is it not your practice on occasion, when you receive an indicator, when you receive information from an indicator, that you have a buy signal, that you look for confirmation of that buy signal by other indicators?

A I don't get a buy signal just by looking at



one indicator.

Q Do you consider --

THE COURT: Or two.

THE WITNESS: Or two.

Q Do you consider the twenty-four month information that you have just referred to on that chart --

MR. KAMERMAN: Twenty-four week.

Q -- twenty-four week information that you have just referred to on that chart as an indicator?

A This is the raw material, and I do consider it as an indicator.

MR. SHAFFER: Mr. Barist, if you would give me Exhibits 42, 43, 44, 45 -- excuse me.

(Pause)

THE WITNESS: For the Dow Jones Industrial Averages. May I add that, your Honor?

MR. SHAFFER: Apparently the witness said something, your Honor, and I would like to move on, if I may.

Q Mr. Witness, looking at the chart you have before you, which is the scroll, Plaintiff's Exhibit 35, and Plaintiff's Exhibits 36, 37, 38, 39, 40 and 41, which are the balance of the charts, and I think you have them all, would you please tell his Honor how many buying

1 indicators you have as a total from those charts -- I  
2 withdraw the question. Forget the scroll.  
3

4 Just look at the flat charts that you have before  
5 you, which are Exhibits 35, 36 -- I take that back -- 36,  
6 37, 38, 39, 40, and 41, and tell his Honor, one by one,  
7 the elements of the total number of buy signals given  
8 to you by that information.

9 MR. BARIST: Your Honor, I object to the form.  
10 He said that he did not get buy --

11 THE COURT: He said?

12 MR. BARIST: He said that he did not get buy  
13 signals from one indicator and, secondly, it has been  
14 asked and answered as to every single one of those charts.  
15 We have gone over this information.

16 THE COURT: He said he got buy signals but not  
17 from any one or two.

18 MR. SHAFFER: Right.

19 THE COURT: As I understand the question, he is  
20 being asked to go through all of the exhibits and indicate  
21 something that will reflect what all of the signals were  
22 that indicated buy, buy signals.

23 MR. SHAFFER: Or the source, your Honor, from  
24 which he would find a buy signal.

25 THE COURT: I am going to sustain the objection.



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MR. SHAFFER: All right, I will ask it again.

THE COURT: It is just much too broad. I am sure the witness must not know whether you are asking for a particular point in time for that to be done or whether you want it all from the chart or what.

MR. SHAFFER: I will clear it up. I will try to tighten it up, so it is not objectionable.

THE COURT: But I gather that essentially what you want is to know now from, let us see -- one moment -- you now have addressed all of the charts pertaining to the year 1969, and you have asked a preliminary question --

MR. SHAFFER: No, sir. With the exception of the scroll.

THE COURT: With the exception of the scroll. And I gather you are now trying to get to the bottom line with reference to that year.

MR. SHAFFER: Yes.

THE COURT: All right. Let us see how you put your question in a way that it can be handled.

MR. SHAFFER: And I am doing it this way, your Honor, because all the other following years will be the same. I know that.

THE COURT: All right. Let me hear how you put it, Mr. Shaffer.

1 [608]  
2 Q Mr. Witness, tell us how many indicators you  
3 have before you on Exhibits 35 through 41, from which you  
4 find a buy signal in your system as employed in 1969.

5 MR. BARIST: It is the same question, your Honor;  
6 same objection.

7 THE COURT: I think it is still much too general.

8 MR. SHAFFER: You have ruled on that question,  
9 your Honor? I am going to ask another one.

10 THE COURT: Yes, sustained.

11 Q Mr. Witness, tell me how many indicators you  
12 look at on Exhibits 36 through 41 to find a buy signal,  
13 that is, the total number.

14 THE COURT: As a general proposition?

15 MR. SHAFFER: Yes.

16 MR. BARIST: It seems to me still the same  
17 question. It still becomes a matter of adding up what  
18 the witness has previously testified to over the last  
19 hour and a half.

20 MR. SHAFFER: That is not so, Judge.

21 THE COURT: Yes. I think he started out giving  
22 an answer to that way back, but I will allow it, and it  
23 will be considered a general question.

24 MR. SHAFFER: Thank you.

25 THE WITNESS: Would you repeat that question



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again?

Q It was so hard to come by, I am going to ask the reporter to repeat it, because apparently it was acceptable.

(Question read)

A May I give the number on each chart, your Honor?

Q That is good idea.

THE COURT: Yes.

A Exhibit 21 --

THE COURT: No, no.

MR. SHAFFER: I will help, your Honor. That is Plaintiff's Exhibit 36 in evidence, your Honor, and it says first chart, other than the scroll.

THE COURT: All right.

A There are three indicators on that chart.

Q Buy?

A That I look at for a buy signal.

Q All right. Let us do sells while you are going through. On that same exhibit how many indicators do you look for a sell signal?

A Three.

Q Go to Exhibit No. 159, which is 37 in evidence, if you please, the Lowry chart for 1969. How many buy

1 [610]

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2 indicators?

3 A Is that Exhibit 159?

4 Q It is.

5 A Two.

6 Q How many sells?

7 A Two.

8 Q Defendants' for identification 83, Plaintiff's  
9 in evidence 38, which is the Dow Jones Industrial Average  
10 chart for 1969. How many buy?

11 A Those indicators are used only after I have  
12 received a buy signal in the other charts and am looking  
13 for the types of stocks and the emphasis in terms of  
14 purchasing. After I have received the buy signal.

15 Q How many do you look at for a buy, for whatever  
16 reasons you look at them?

17 MR. BARIST: Objection, your Honor. That is a  
18 mischaracterization of the testimony.

19 THE COURT: No, let us try it this way. After  
20 you have done these other things, how many indicators were  
21 buy signals?

22 THE WITNESS: Only after I have done those  
23 other things, I look at two indicators.

24 Q How many for a sell?

25 A This is 168.



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Q Right.

A Two indicators --

Q No, no, it is 183.

A You said industrial averages.

Q DJI Industrial Average for 1969 I believe is on the ticket 183.

A Oh, yes, I was looking at --

Q And that is Plaintiff's Exhibit 38 in evidence.

A I look at --

Q Wait a minute. Does this change all this "only after" that you have just testified to, now that you are looking at that chart as identified now?

A No. I look at these charts only after.

Q Fair enough. How many buy? You said two. How many sell?

A I did not say two on this index.

Q How many did you say?

THE COURT: Wait. It is just hopelessly confusing now. Will you start again with P38 from the beginning and we will take the answer with whatever restrictions there are. I am going to strike the answer as it exists as to P38 up to this point.

MR. SHAFFER: I understand.

Q Plaintiff's Exhibit No. 38 in evidence, which

1 is marked Defendants' Exhibit 183 for identification,  
2 whenever you look at it, and after whenever you look at  
3 it --  
4

5 A 183?

6 Q Yes. Do you have it?

7 A I do have 183.

8 Q That is the Dow Jones Industrial Average chart.

9 A Yes.

10 Q How many indicators do you look at to find a  
11 buy?

12 A One.

13 MR. BARIST: Excuse me, your Honor.

14 THE COURT: Yes, sir?

15 MR. BARIST: I think it is only fairness to the  
16 witness that we have not struck his testimony that he only  
17 looks at 183 after he has --

18 THE COURT: We have stricken that. So if there  
19 are any limitations in terms of the answer to this  
20 question, he should tell them all to us right now.

21 MR. BARIST: In that case I think it is fair  
22 that the witness be given the opportunity to place the  
23 limitation on that which he had placed in his previous  
24 testimony.

25 THE COURT: Yes. That is the intention.

MR. BARIST: Yes.



THE COURT: Go ahead, Mr. Witness, follow the lead of your counsel and give us any limitations if there are any that you wish to impose as a restriction upon your answer thus far given.

A I look at 183 only after I have received in my judgment a buy signal on other indicators.

Q Very good. How about sell?

THE COURT: Just a moment.

A And I use one indicator on that chart.

Q For sell?

THE COURT: No, to buy.

A To buy.

Q Now tell me sell.

A I use two indicators on that chart after I have received, in my judgment, a sell signal on the market.

THE COURT: One moment.

A Which is the other charts.

THE COURT: That is another "only after" situation?

THE WITNESS: Yes.

MR. SHAFFER: Can I go on?

THE WITNESS: Your Honor, just to clarify things, there is a third index on this industrial chart, which is a twelve weeks. I was keeping that for research and

experimental purposes.

THE COURT: We will consider that a background answer.

MR. SHAFFER: That is all right. It is helpful.

Q Now going to Defendants' Exhibit 209 for identification, which is 39 in evidence, the Dow Jones Utility Average chart for the year 1969, will you tell me when you have that chart before you.

A I do.

Q How many indicators did you look at on that chart to find a buy signal?

A After I have received a buy signal on the other indicators that I mentioned, I look at one index, the six weeks index.

Q And how many sells?

A Two.

Q Is that an "only after" situation, for the sells?

A Yes.

MR. SHAFFER: He said yes, Judge.

THE WITNESS: Yes.

Q Going to 40, which is Defendants' Exhibit 196 for identification, Plaintiff's Exhibit 40 in evidence, the chart relating to the Dow Jones Railroad Average for the year 1969, when you have that chart, please tell me.



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A I have it.

Q How many indicators do you look at to determine whether there is a buy signal?

A One.

Q Is that an "only after" situation?

A That is correct.

Q How many sell indicators do you look at to find a sell signal?

A Two.

Q Is that an "only after" situation?

A Yes.

Q Going to Plaintiff's Exhibit 41 in evidence, Defendants' Exhibit 168 for identification, the Dow Jones Industrial Raw Material chart for the year 1969, would you tell his Honor how many indicators you look at on that chart to find a buy signal.

A For a buy?

Q Yes.

A Only after?

Q Yes. I will get to that, but go ahead.

A I look at two.

Q Is that an "only after" situation?

A Yes.

Q How many indicators do you look at to find a

1 [616]

deGive - direct

A-486

2 sell signal?

3 A Four.

4 Q Did you say four? Four?

5 A Yes.

6 Q Thank you. Is that an "only after" situation?

7 A Yes.

8 Q Is the information reflected in the two  
9 indicators you look at to determine a buy signal on  
10 Defendants' Exhibit 168 for identification, which is  
11 Plaintiff's 41 in evidence, separate and apart from the  
12 information shown in the index you look at to find a buy  
13 signal as reflected on the industrial average chart,  
14 which is Plaintiff's Exhibit 38 in evidence and  
15 Defendants' Exhibit 183 for identification?

16 MR. SHAFFER: If you would like the reporter to  
17 repeat the question, I would be happy to have him do it.

18 THE COURT: I would. Please read it back.

19 MR. BARIST: I object to the form.

20 THE COURT: Let us hear the question.

21 THE WITNESS: Your Honor --

22 THE COURT: Wait until I hear the question.

23 MR. SHAFFER: I will shorten it and withdraw it,  
24 your Honor.

25 THE COURT: Withdrawn.



1 [617] deGive - direct A-487  
2 Q Let me do it this way. Mr. Witness, please  
3 consult now the Dow Jones Industrial Average charts,  
4 which is Plaintiff's 38 in evidence, Defendants' 183 for  
5 identification, and the last chart we mentioned, which is  
6 the Dow Jones Industrial Raw Material figure chart.

7 THE COURT: Which is?

8 Q Which is 41 in evidence and Defendants' 168  
9 for identification. Do you have those two charts?

10 A I do.

11 Q You testified with respect to the average chart,  
12 that you look at one indicator to find a buy signal in an  
13 "only after" situation. Will you confirm that.

14 A Yes.

15 Q You also testified with respect to the latter  
16 chart, the raw material chart, that you look at two  
17 indicators to find a buy and in an "only after" situation.

18 A Yes.

19 Q I want to know: Is the one indicator reflecting  
20 the same information on Exhibit 183 as is reflected in  
21 either of the indicators you look at on 168?

22 A The chart on -- 168, those indices are the raw  
23 figures before the indexes are calculated on 183.

24 Q In your experience has it ever -- have you  
25 finished your answer? -- because I don't want to cut you

1 off. Have you finished?

2  
3 A Yes.

4 Q What I want to know now is: In your experience  
5 has the indicator on Plaintiff's 38 in evidence, Defendants'  
6 183 for identification, in the Dow Jones Industrial  
7 Average chart ever contradicted either buy indicator  
8 shown on Defendant 168, which is the raw material chart,  
9 Plaintiff's Exhibit 41?

10 A No.

11 MR. BARIST: I was going to ask to have that  
12 question read back, because I could not follow it.

13 THE COURT: Read it back.

14 (Question read)

15 Q My next question is: Do you consider the buy  
16 indicator shown on the average chart, which is Plaintiff's  
17 38, Defendant 183 for identification, as separate and  
18 distinct from the buy indicator shown on the raw material  
19 charts, as you do either buy indicator on the Lowry chart  
20 from any buy indicator on Plaintiff's 36, which is  
21 Defendant 121, the first chart that you --

22 THE COURT: No, no, just hold it.

23 MR. SHAFFER: I will withdraw the question.

24 THE COURT: I think we have all been trying to  
25 go through these gyrations to stay abreast of these



1 transpositions, but it becomes increasingly difficult.  
2 We have a third factor in the picture that is making it  
3 even more difficult now, which is the switch from the  
4 plaintiff's markings not only to the defendants' markings  
5 but also now to the actual description of the material.  
6 It is just much, much too confusing. Given the use of  
7 multiple charts, we should be using common designations,  
8 whether they are plaintiff's or defendants'. I don't  
9 think we should try to use the references to Dow Jones  
10 Industrial or whatever.  
11

12 MR. SHAFFER: My purpose is not to confuse.

13 THE COURT: What?

14 MR. SHAFFER: You understand my purpose is not  
15 to confuse, even though that may be a fact. I will with-  
16 draw the question and I will move on to something else.

17 THE COURT: Yes.

18 MR. SHAFFER: I want to be helpful. I am not  
19 trying to hurt myself by confusing the finder of fact.

20 THE COURT: No, I am not suggesting that you are  
21 trying to confuse me.

22 MR. SHAFFER: Now may I please have, Mr. Barist,  
23 from you Plaintiff's Exhibits 42, 43, 44, 45, 46, and 47  
24 in evidence, and I am going to whisper in your ear.

25 (Conference between Mr. Shaffer and Mr. Barist.)

MR. BARIST: Your Honor, would this make life any easier? I am perfectly willing to stipulate on the record that these charts are parallel from year to year.

MR. SHAFFER: That is helpful.

MR. BARIST: In other words, that what happens here is that the witness has identified this afternoon a large scroll chart, which is Plaintiff's 35. That goes throughout from approximately, I think that runs about fifteen years on that. If you opened it up, it would go about the length of the courtroom.

After that, each year the witness has the same series of small charts which have presently been the subject of the testimony for the year 1969.

So that if we take the block of charts for 1970, which is Plaintiff's 42 through 47; for 1968, which is Plaintiff's 48 through 53; and for 1967, which is --

MR. SHAFFER: 54 through 59.

MR. BARIST: -- 54 through 59, with at most one or two minor exceptions when you get down into the Dow Jones charts, and that is a remote possibility, they are going to run in parallel. I marked them in my exhibit list in parallel. I put all the charts which belong together together in the exhibit lists, so that if anybody wanted to see what are all the deGive Dow Jones charts,



1 public utilities, they are right there. You want to see  
2 the twelve- and eighteen-day cycles through the years in  
3 question, or for as many years as Mr. deGive had records,  
4 they are there.  
5

6 MR. SHAFFER: He says too much, Judge. We are  
7 beyond what I need.

8 MR. BARIST: If that would be helpful to your  
9 Honor, I am willing to do that.

10 THE COURT: All right. Let me suggest that we  
11 interrupt here and the witness step down and leave the  
12 courtroom, because I am going to ask Mr. Shaffer now in  
13 the time we have remaining to make an offer of proof,  
14 which looks toward our resumption tomorrow morning at  
15 9:30 and the balance of our court time tomorrow. I want  
16 to particularly know where do you represent that we are  
17 going to next in this process.

18 Essentially, what I am driving at is --

19 MR. SHAFFER: I know exactly what you are  
20 driving at, Judge, and I am prepared to answer.

21 THE COURT: In due course, what is it that you  
22 wish me to conclude and how do you propose to reach the  
23 point where you put me in the position to conclude it if  
24 I agree with you?

25 MR. SHAFFER: Ultimately I want you to conclude

1 that, No. 1, Mr. deGive says he had a system that he  
2 applied to Mrs. Van Alen's account. I want to show you,  
3 if allowed by the evidence that I hope to adduce, that  
4 Mr. deGive did not follow that system in the years  
5 during the complaint period. As the evidence showed,  
6 he followed it in the years preceding the complaint  
7 period, and that there was a dramatic change in his  
8 investment policy.  
9

10 Instead of, in the complained-of period, making  
11 trades as he had previously on a long-term basis, we jump  
12 from long-term trading to short-term in-and-out trading,  
13 which establishes the charge contained in counts 1, 3 and  
14 4 of the bill of complaint.

15 Now, to do that, I have examined Mr. deGive  
16 thus far, and your Honor has taken copious notes and has  
17 noticed that Mr. deGive, if I may say by way of what I  
18 think is past proof and not an offer of proof -- and I  
19 don't want to argue the case now -- I think I have  
20 demonstrated changes in Mr. deGive's description of what  
21 happened on a given occasion. When you ask him, "Is my  
22 client an agile trader or is there an account to be  
23 handled as an agile trader?", on one occasion he says  
24 one thing, on another occasion he says another thing.  
25 The same thing with intermediate. The same thing with



whether or not he is looking for the confirming long-term signal, the sixty-day signal, which is the differentiation in a long-term buy as opposed to short-term trades and the intermediate trades, and buying on an intermediate oversold condition.

I will come to introducing charts which will show graphically the increase, dramatic increase, in short-term trading, beginning February 11, 1969, and ending on March 3 when my client took the account away from him, as compared to a three-year period prior to the beginning of the February 11, 1969 period.

Second, I want to go forward by getting these charts in evidence, which I realize has been very laborious for the Court. I want to have him indicate where his buy signals come from, where his sell signals come from. I want him to state, as he has in the pretrial, your Honor, that he finds a long-term buy signal when 60 percent of the indicators indicate such a signal, and that it is his policy to move on 60 percent. It is his policy to commit a majority of the account on 50 percent, but certainly on 60 percent. Whether he was trading \$100,000 or \$500,000 or \$1.5 million, he would commit it on 60 percent of the signals.

I am going, after I get these charts in

1 evidence, to go to three specific areas on the charts.  
2 Your Honor will recall the other day I referred that I  
3 was hesitant to go into a swamp with the witness because  
4 he knew the swamp better than I did, and I know your  
5 Honor thinks we are all in a swamp now, but I assure you  
6 we are not. I am going to avoid getting to a point  
7 where I am lost with him.  
8

9 But I want to go to three areas, and I want to  
10 show in those three areas that, No. 1, he did not have  
11 60 percent of the signals when he did what he said he  
12 did and committed on February 11, 1969. I want to show  
13 that in 1968, when he had a clear buy signal and he was  
14 uninvested, he did not follow that signal in 1968, as a  
15 comparison so that your Honor can see what he does on one  
16 occasion as opposed to what he does on another.

17 I want you ultimately to conclude that from all  
18 of this evidence that this system is a paper system, it  
19 is an umbrella that Mr. deGive can hold over his head,  
20 but the fact of the matter is it does not save him from  
21 a churning charge, when the evidence shows the in-and-out  
22 trading, when the evidence shows the excessive trading,  
23 when the evidence shows a change in his investment  
24 pattern before 1969 as opposed to after 1969.

25 It is only by that that I can demonstrate



1  
2 from his system the fact of fraud which underlies all  
3 four counts that are open before your Honor, whether  
4 they be statutory fraud in the form of churning or  
5 whether they be common law fraud. From all the other  
6 evidence that I expect to be in the record before  
7 plaintiff rests, I will be able to present to your Honor  
8 a considerable array of factors from which I think you  
9 can find that the plaintiff has prevailed on her proof.

10 I expect to do this --

11 THE COURT: By noontime tomorrow?

12 MR. SHAFFER: Yes. That is, if Mr. Barist is  
13 helpful.

14 MR. BARIST: Your Honor, a couple of comments,  
15 if I could. One, I think the only thing I can agree with  
16 Mr. Shaffer on is that this is a fraud case, and what it  
17 is being turned into is a question of whether or not  
18 Mr. deGive had a good or a bad system, whether Mr. Shaffer  
19 and Mr. Kamerman can read his system better than Mr. deGive  
20 can read his system.

21 I would like to point out that as a matter of  
22 law if Mr. deGive was incompetent in working his system,  
23 that would be irrelevant to plaintiff's case. The  
24 charge is churning, which is the generation of trades  
25 for the purpose of making commissions.

2 THE COURT: But, you see, it seems to me you  
3 are overlooking, Mr. Barist, that one of the issues that  
4 has yet to be determined, cannot really be determined  
5 until all of the evidence is in, is the question of  
6 motive and intent.

7 MR. BARIST: Your Honor --

8 THE COURT: You have one sense of what that  
9 was. You call it possibly inconsistency or ineptness  
10 or --

11 MR. BARIST: No, I don't, your Honor. I don't  
12 think that the evidence will --

13 THE COURT: The exercise of good judgment, or  
14 whatever.

15 MR. BARIST: The exercise of --

16 THE COURT: Mr. Shaffer is calling it fraud,  
17 scheme, device. So motive becomes important. But we  
18 cannot draw any conclusions about that until I have  
19 heard all of the evidence.

20 It is helpful to have some idea of where we are  
21 headed and that we are still on course. We are going to  
22 resume tomorrow morning at 9:30.

23 (An adjournment was taken to November 12, 1976,  
24 at 9:30 a.m.)  
25



1 [627]

deGive - direct

A-497

2 VAN ALLEN VS DOMINICK &  
3 DOMINICK, INC., and  
PAUL deGIVE

New York, N. Y.  
November 12, 1976 - 9:50 a.m.

4 MR. SHAFFER: Good morning. Your Honor, I  
5 apologize for being late this morning. Traffic was a  
6 little heavier than expected.

7 Your Honor, I have given Mr. Barist a copy, and  
8 that is what I would term bank exhibits, correlating the  
9 items that were marked in evidence. The left-hand column,  
10 the center column, was what was the exhibit number  
11 previously ascribed to these items and the third is my  
12 description, a description which may be helpful, but I  
13 just want your Honor to know it.

14 Mr. deGive, will you take the stand again,  
15 please.

16 P A U L d e G I V E, resumed.

17 THE COURT: You are still under oath.

18 DIRECT EXAMINATION (continued)

19 BY MR. SHAFFER:

20 Q Mr. deGive, yesterday we discussed your flat  
21 charts. I would like you to look at your scroll chart  
22 and tell me, as you did with respect to the other charts --  
23 or tell his Honor -- show it to a point, so his Honor can  
24 see, what oscillates and what your other indicators are  
25 on that chart.

MR. BARIST: May I ask that the question be rephrased, your Honor.

THE COURT: Rephrase it.

MR. SHAFFER: Withdrawn.

Q Mr. deGive, please open your chart to any period you like.

THE COURT: That chart, as I understand it, is Plaintiff's 35 in evidence.

MR. SHAFFER: In evidence, right.

Q What section do you have it open to?

A This is in the period February-March of 1970.

Q Did the indicators that are shown in that period run throughout the entire chart?

A Back.

Q Yes.

A Yes.

Q What indicators are on that chart?

A Your Honor, this blue line is a seven-day moving average, and it is calculated by taking the number of issues traded in a day that have advanced and dividing it by the total number of issues traded for that day. I have got a percent.

I then take seven days of that calculation -- six days prior to that day --



1  
2 THE COURT: Excuse me one moment. What do you  
3 take next?

4 THE WITNESS: I take the six days prior to that  
5 date, making a total of seven. And then I divide it by  
6 seven to get an average. It is called a moving average,  
7 because each --

8 THE COURT: You say then you divide it by seven  
9 and you get what?

10 THE WITNESS: I get an average at seven days.

11 THE COURT: All right.

12 THE WITNESS: But it is a moving average,  
13 because each day I take off the first day of that seven  
14 day and add the new day.

15 THE COURT: One moment. Which day do you drop?

16 THE WITNESS: The first day of the seven day.

17 THE COURT: All right.

18 THE WITNESS: This --

19 Q Before you go to the next portion of your answer,  
20 Mr. deGive --

21 MR. SHAFFER: Your Honor, would it be feasible  
22 for Mr. deGive to set that chart up at the blackboard?

23 THE COURT: Yes, it would.

24 Q Mr. deGive, if you would be comfortable off the  
25 witness stand and over there somewhere, without damaging



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it.

I think there is a pointer over there, Mr. deGive, if you want to take the pointer.

Well, I don't have a pointer to give you, Mr. deGive.

Just so I can see, what indicator was it that you just explained to his Honor?

A I was pointing to this blue line in the lower portion of the chart, oscillator.

Q And that related to advancing issues?

A That was the number of advances, issues that advanced, in a day, divided by the total number of issues traded that day, to get a percent.

Q All right.

A I then take the previous six days, add them together to make seven days, and divide by seven to get an average.

Q When that line goes up, does that mean that the market is going up?

A Not necessarily.

Q As a general rule, with exceptions?

A It means that the ratio of issues advancing divided by the total number of issues traded is improving, the seven-day moving average.

Q What is the next indicator on that chart?



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2           A     In that same general lower area there is a red  
3 line which is a ten-day moving average.

4           Q     Of the same material?

5           A     The ten-day moving average is calculated by  
6 taking on a day the number of issues that have declined  
7 and dividing it by the total number of issues traded, to  
8 get a percent.

9           THE COURT:   Yes?

10          A     I then take the previous nine days, add them to  
11 the current day, making a total of ten, and divide it by  
12 ten to get an average.

13          Q     That is a mirror image of the blue line, except  
14 it is a different period of time, isn't that so?

15          A     I don't understand the word "mirror" in this  
16 respect.

17          Q     What is your next indicator?

18          A     In the upper section there are two lines, a  
19 blue and a red line. The blue line is calculated by  
20 taking the number of issues that advance in a particular  
21 day and taking a total of eighteen days and adding them  
22 together.

23          THE COURT:   And then?

24          THE WITNESS:   Each day I add the number of  
25 issues that have advanced -- I take the number of issues

1  
2 that have advanced for that day and first subtract the  
3 first day of the eighteen-day moving average and add the  
4 new day to it. That is the blue line.

5 THE COURT: What does that give you?

6 THE WITNESS: The other line is a red --

7 Q The judge said: What does that give you?

8 A That gives me a calculation of buying in the  
9 market.

10 Q Is that a buying-power line?

11 A It is a buying-power line.

12 Q Very good. Go to the red line, Mr. deGive.

13 A The red line is eighteen days of the number of  
14 declines each day for eighteen days.

15 Q Will you just repeat that again.

16 MR. BARIST: Could the court reporter read the  
17 answer, please.

18 (Answer read)

19 Q Is that a selling-power line?

20 A Yes, that is a selling-power line.

21 Q Or a selling-pressure line?

22 A A selling-pressure line.

23 Q Mr. deGive, go to your next indicator, if you  
24 please.

25 A In the upper chart is an hourly recording of the



sixty-five-stock average.

Q Is there a scale on the left somewhere of that chart?

A And in that general area there is a scale for that sixty-five-stock average. There are scales in both of the -- the middle section and the lower section.

THE COURT: Are you referring to sixty-five particular stocks?

THE WITNESS: Yes, your Honor. In the Dow Jones setup there are thirty stocks in the Dow Jones Industrial Average. There are stocks in the public utility average. And at that time there were stocks in the railroad average, which is now described as the transportation average. The industrial average, public utility average, and railroad average number of stocks total sixty-five if added together.

THE COURT: That hourly recording is reflected by what kind of line in the chart?

THE WITNESS: There is a position of recording each hour following the --

THE COURT: The color?

THE WITNESS: It is a pencil recording each hour.

Q Is that that graphic representation of peaks?

A Yes. Peaks and declines.



1 [634] deGive - direct A-504  
2 Q In that upper portion you draw some lines of  
3 your own to measure speed and thrust and so forth, don't  
4 you?

5 A This sixty-five-stock average -- and those lines  
6 are of minor importance.

7 Q But you do draw some lines to measure?

8 A I also draw some lines down below, as you see.

9 Q Yes, but I want to stay up above. Do you draw  
10 lines up above?

11 A Yes, I do.

12 Q Do you take angles up above, protractor  
13 measurements up above?

14 A I draw them in either with a parallel ruler or  
15 with a protractor. It could be done either way.

16 Q And that is to determine certain angles from  
17 which you make your own calculations about the speed of  
18 a line, isn't that so?

19 A It's to give me a visual look at the market.

20 Q But you want to determine the speed of a  
21 particular line on occasion in that upper portion?

22 A It helps me to follow the speed.

23 Q You do make calculations based upon speed with  
24 respect to that upper portion?

25 A No.



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Q Do you determine speed in the upper portion?

A I look at the movement of the --

Q Just yes or no. Do you determine speed --

MR. BARIST: Your Honor, I don't think it can be answered yes or no.

MR. SHAFFER: We will find out, Mr. Barist, if you will be patient.

MR. BARIST: There was a question asked and the witness was about to answer, and he interrupted him.

THE COURT: Do you withdraw it?

MR. SHAFFER: I withdraw it.

THE COURT: All right.

Q Do you determine speed in the upper portion?

THE COURT: "Determine" meaning calculate or follow? He said he follows.

MR. SHAFFER: "To find out."

THE COURT: Determine: calculate.

Q All right, calculate.

A No, I follow. I do not determine or calculate.

Q All right, but you follow?

A Yes.

Q You come to know the speed of certain lines in the upper portion?

A I don't understand that question.

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Q You don't understand whether you come to know the speed of lines in the upper portion?

A Speed of the lines?

Q Yes, speed.

A Lines don't move.

Q They don't. All right. Do you determine angles?

A Yes, I can measure angles.

Q Does the angle of 50 degrees mean something to you in your system with respect to the upper portion?

A Any angle will mean something.

Q But does the angle of 50 degrees mean something to you more particularly than any other angle?

A No.

Q Is that a demarcation, the angle of 50 degrees?

A 50 degrees is half of 100, yes.

Q No, I understand, but do you say in your -- withdrawn.

MR. SHAFFER: May I have a minute, your Honor.

(Pause)

Q Do some lines have a fast speed and other lines have a slow speed, in the upper portion?

A Your Honor, I do not understand that question. The line is not a question of speed. The line is a line.

Q Do the degrees that you calculate with respect



1  
2 to lines in the upper portion present to you normal bands  
3 of speed, slow bands of speed, and fast bands of speed?

4 A The various lines drawn there are different  
5 angled lines.

6 Q Yes. Do those angles present to you different  
7 bands of speed?

8 A Oh, yes.

9 Q Fine. Does the angle of 50 degrees demark one  
10 band of speed from another?

11 A From another angle of 50 degrees?

12 Q No, not another angle. Either a faster one or  
13 a slower one. Is that the demarcation for you?

14 A I regard the 50-degree angle as a 50-degree  
15 angle, the 30-degree angle or the 20-degree angle or the  
16 75-degree angle as a different angled line.

17 Q Were you asked this question and did you give  
18 this answer, reading from page 531 of your deposition on  
19 November 1, 1972:

20 "Question: Is 60 degrees a normal band of speed?

21 "Answer: 50 degrees is the normal band of speed."

22 Did you give that answer to that question?

23 A I did.

24 Q Was it true when you gave it?

25 A It was.

1 [638] deGive - direct A-508

2 Q Is it true today?

3 A It is.

4 Q How would you characterize 60 degrees, Mr.

5 deGive?

6 A As 60 degrees, 10 degrees more than 50 degrees.

7 Q On the same page, Mr. deGive, did you give

8 the following answer to the following question:

9 "Question: How could you characterize 60 degrees?

10 "Answer: Above a normal band speed."

11 Did you give that answer to that question?

12 A I did.

13 Q Was it true when you gave it?

14 A Yes.

15 Q Is it true today?

16 A It is.

17 Q Mr. deGive, when the market is moving above a

18 normal band of speed as shown on that indicator, what does

19 it signify?

20 A That it is moving above the normal band. I am

21 very obviously aware of it -- excuse me, I would like to

22 correct that. I am aware of it.

23 Q Mr. deGive, what other indicators are there on

24 that chart?

25 A There are some -- there is some raw material at



1 the bottom, your Honor. Each day I put the raw material  
2 on the bottom of the chart. The total number of issues  
3 traded, the number of issues that advanced for that day,  
4 and the number of issues that declined for that day.  
5

6 Q How is that material expressed in the bottom  
7 part of the chart, Mr. deGive?

8 A It is expressed in a series of levels each day  
9 for the advance, the level each day for the decline, and  
10 the level at the top each day for the total number of  
11 advances. This is your total number of advances -- I  
12 mean, excuse me -- this is your total number of issues  
13 traded, this black line coming up here.

14 Q That is a vertical line?

15 A That is a vertical line. There is a blue  
16 vertical line coming up which expresses on a scale the  
17 total number of issues that advanced for that day. The  
18 red line is a vertical line showing the total number of  
19 issues that declined for that day on the vertical scale.

20 THE COURT: What color portrayed it?

21 THE WITNESS: Excuse me, your Honor?

22 THE COURT: What color reflects number of issues  
23 traded?

24 THE WITNESS: It's a penciled line.

25 Q Mr. deGive, what are those lines across? Are

1 they just connecting lines to make the visual observation  
2 of the heights of the vertical lines more easy to read?

3  
4 A Yes, sir.

5 Q Did you understand my question?

6 A These red lines that are drawn here are certain  
7 parameters as a visual point, so that you can get a visual  
8 calculation, rather than looking at each one of those  
9 squares, your Honor.

10 Q Is that also --

11 A Because it makes it more convenient to read than  
12 having to look each time at this level. You know there are  
13 certain parameters over a period of years around which  
14 those moving averages oscillate, meaning moving up and  
15 down.

16 Q Are those principles also true with respect to  
17 the material on the very bottom part of the chart with  
18 respect to --

19 A I don't understand that question.

20 Q There are certain lines that are drawn  
21 horizontally or at angles to a horizontal, and I want to  
22 know, are these just visual abilities to compare the levels  
23 that are shown by the perpendicular lines?

24 A They are drawn for the purpose of -- from one  
25 top to the next top and down and back and forth. From



tops of this buying power, each day the number of issues advanced, it's drawn down for the total number of issues advanced the next day. It's for visual use.

THE COURT: To show direction of movement.

THE WITNESS: Exactly.

Q Thank you. Mr. deGive, are there any other indicators on that chart?

A Indicators?

Q Yes.

A No.

Q Mr. deGive, how do we measure time on that chart with respect to a day?

THE COURT: Before you go on, are there seven-, ten-, and eighteen-day lines on that chart?

THE WITNESS: Your Honor, this is a seven-day, the blue line. There is a ten-day --

THE COURT: That is what you described at first, at the beginning.

THE WITNESS: And these are eighteen-day moving averages up here.

THE COURT: You described the blue line as a seven-day, the red line as a ten-day --

THE WITNESS: Yes.

THE COURT: -- and then in the upper section you

described the blue line pertaining to eighteen days;  
correct?

THE WITNESS: Advances.

THE COURT: And a red line pertaining to  
eighteen-day declines.

THE WITNESS: That is correct.

THE COURT: Are those indicators identical in  
concept to the indicators you described yesterday on the  
charts we were using yesterday?

THE WITNESS: Yes.

THE COURT: The concepts are the same?

THE WITNESS: The concepts are the same. It is  
an effort -- it is a method of calculating buying and  
selling pressures.

Now, the other charts include other material,  
if you don't mind my explaining that, your Honor.

THE COURT: I want to give it back to Mr. Shaffer.

BY MR. SHAFFER:

Q I am sorry, Mr. deGive, go ahead and complete  
your answer.

A That is the answer.

Q Mr. deGive, I was going to ask you how do you  
measure time on that chart, not the hourly indicator but  
I mean day-to-day movement?



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[643]

deGive - direct

A-513

A How do I measure time?

Q Yes.

A On this chart there are five little squares representing five hours in the stock market for each day -- 11 o'clock, 12 o'clock, 1 o'clock, 2 o'clock, and 3:30, closing.

Q Would you point to the five so his Honor can see it.

A That would be these five little squares, your Honor, between this vertical line and that slightly lighter vertical line. So from this line to that line there would be one trading day, composed of five hours.

Q Is that --

A In the big -- rather, deep blue line there is one slightly less blue line for one day and then a deeper blue line for the next day, just for visual observation.

Q Within that division of a day, are there five boxes shown on that chart?

A I have explained that there are five hours in the market.

Q I don't see his Honor can see that, though, from where he is sitting.

THE COURT: Each square represents an hour?

THE WITNESS: An hour, that is correct. Each



2 small square.

3 THE COURT: The small square.

4 THE WITNESS: This is a bigger square which  
5 represents a day and this is a slightly bigger square  
6 representing two days.

7 Q Mr. deGive, I think maybe you can go back to the  
8 stand.

9 With respect to that chart you have just gone  
10 through, are there both buying indicators and selling  
11 indicators?

12 A There are buying and selling pressure indicators.

13 Q Are there indicators on that chart from which  
14 you get a buy signal?

15 A Yes.

16 Q Are there indicators on that chart from which  
17 you get a sell signal?

18 A Yes.

19 Q Now tell me, with respect to the scroll charts,  
20 Plaintiff's Exhibit No. 35 that you have just discussed:  
21 How many indicators are on that chart from which you get  
22 a buy signal?

23 A There are four important indicators that I get  
24 a buy signal on from that chart, or can draw a conclusion  
25 as to a buy signal, and a fifth indicator which is a



visual charting of the market.

Q Is that a visual look at certain portions of that chart and making a comparative judgment?

A Yes.

Q As an example, would it be a comparison of levels?

A Yes.

Q Would this fifth less important indicator -- is it less important than the other indicators?

A I said it was of minor importance.

Q Is it of lesser importance?

A Yes.

Q Would this lesser important indicator be combined to the area or the parameters of the hourly, stock hourly portion of this chart?

A It is used to compare levels.

Q Right. But within the stock hourly portion.

A Over a period of more than one hour.

Q Yes, I understand that. But I mean it is in this portion of the penciled lines charting the sixty-five hourly stock average?

A It's within the charting of the sixty-five-stock average.

THE COURT: Let me understand that last



1 question, now, again. Is what within the charting of the  
2 sixty-five-stock average?  
3

4 MR. BARIST: Your Honor, I think the question  
5 was probably unclear. If you asked Mr. deGive which is  
6 the minor and lesser important figures on the chart, I  
7 think he would answer that and clear up your Honor's  
8 question.

9 THE COURT: I am really trying to limit myself  
10 to a clarification of the answer given to Mr. Shaffer's  
11 question.

12 MR. BARIST: That is what I thought Mr. Shaffer  
13 was looking for.

14 THE COURT: The question was, is it within  
15 the charting of the sixty-five-stock average? Is what  
16 within the charting of the sixty-five-stock averages?

17 MR. SHAFFER: The lesser indicator.

18 THE COURT: The hourly portion is deemed that  
19 lesser indicator.

20 Is this system employed today by yourself or  
21 anyone else?

22 THE WITNESS: It's employed by me today, your  
23 Honor.

24 Q How many indicators on that exhibit are there  
25 from which you can determine a sell signal?



2 A There are five indicators on that chart, one  
3 of minor importance, that I use to determine a sell  
4 signal.

5 Q Is that the same one, of minor importance?

6 A That's correct. The buying and selling pressures  
7 are important.

8 Q How many indicators are there altogether on  
9 Exhibit 17?

10 MR. BARIST: Objection, your Honor. It has been  
11 asked and answered.

12 THE COURT: On Exhibit?

13 MR. SHAFFER: On Plaintiff's Exhibit 35.

14 MR. BARIST: That is the scroll.

15 THE COURT: Well, I will allow it.

16 THE WITNESS: Is this Exhibit 35?

17 THE COURT: Yes.

18 Q It is.

19 A There are two blue lines and two red lines, which  
20 make four, and the recording of the sixty-five-stock  
21 average up above on an hourly basis, which is the fifth,  
22 and that is of minor importance.

23 Q Were you asked this question and did you give  
24 this answer?

25 MR. SHAFFER: Mr. Barist, I am on page 452 of

1 [648] deGive - direct A-518  
2 Mr. deGive's deposition.  
3 Q "Question: How many indicators are there on  
4 Exhibit 17?"  
5 MR. SHAFFER: This is 17, your Honor.  
6 THE COURT: Page, again?  
7 MR. SHAFFER: 452.  
8 Q "Question: How many indicators are there on  
9 Exhibit 17?  
10 "Answer: Oscillators?  
11 "Question: Indicators.  
12 "Answer: Four. Four oscillators: a Dow Jones  
13 sixty-five stock average, daily issues traded, advances  
14 and declines for each day.  
15 "Question: Are there seven altogether, then, on  
16 Exhibit 17?  
17 "Answer: Eight."  
18 Did you give that answer to those questions?  
19 A At the bottom there --  
20 Q Either you did or you did not. The question  
21 is, did you give the answer I read to the question that was  
22 read?  
23 A Would you repeat that question?  
24 Q Certainly. Page 452.  
25 "Question: How many indicators are there on



Exhibit 17?

"Answer: Oscillators?

"Question: Indicators.

"Answer: Four. Four oscillators: a Dow Jones sixty-five-stock average, daily issues traded, advances and declines for each day.

"Question: Are there seven altogether, then, on Exhibit 17?

"Answer: Eight."

Did you give that answer to that question?

A I did.

Q Was it true when you gave it?

A It was true.

Q Is it true today?

A It is. Those three points at the bottom are raw material, and they are indicators.

THE COURT: He is allowed to explain.

Q Earlier this morning when I asked you how many indicators there were and you indicated five for a buy and five for a sell, one of which was not of as major importance in the upper sixty-five-stock plotting of the average, you did not mention the lower three indicators, did you?

MR. BARIST: Objection, your Honor. It is a

mischaracterization of his testimony, No. 1; No. 2, earlier this morning when he was asked what was on that chart, he specifically went through the plotting at the bottom.

THE COURT: Just change your question and ask him, "Did you," and then change the whole thing.

MR. SHAFFER: I will.

Q Did you leave out the bottom indicators you just mentioned when I asked you how many buy indicators there are and how many sell indicators and you indicated five each?

A There are five indicators on that chart that I use for buying and selling. The fifth is a minor one.

Q And you don't use the bottom portion?

A That is raw material of the daily activity in the market.

Q You don't use it in determining a buy indicator, do you?

A I said there are five indicators on that chart that I use to buy or sell, and the fifth is a minor one.

Q None of the five indicators come from the lower portion of the chart, right?

MR. BARIST: With a chart of that size, rather than lower portion, could he refer to what portion he is



1  
2 talking about?

3 Q Mr. deGive, I am taking the pointer, and so  
4 that the record will know what I am doing, I am pointing  
5 to a red line that is approximately 12 inches up from the  
6 bottom of the chart, which runs across, this line as I run  
7 my pointer. The information appearing at or about that  
8 line or below, do you get any of your signals from that  
9 material?

10 A That material is the daily recording, your  
11 Honor, which is included in the four oscillators up  
12 above.

13 Q I understand, but do you get --

14 A For each day there are a certain number of  
15 advances. I take the total number of advances and divide  
16 it by the total number of declines to calculate my seven-  
17 day moving average of buying.

18 Q Yes, but once you observe that information in  
19 the upper oscillators, you don't go down here and look  
20 for it, do you?

21 A I don't understand that question.

22 Q All right, I will try to place it so you do.  
23 You have indicated there were five buying indicators.

24 A Yes.

25 Q And those five buying indicators appear on this

chart above the portion where I have placed the pointer.

A That is correct.

Q And there are five sell indicators?

A That is correct.

Q Those sell indicators appear above the portion where I place the pointer.

A That is correct.

Q And the material below the portion where I have placed the pointer is raw material from which those buy indicators are formulated, isn't that so?

A And selling indicators.

Q And selling indicators are formulated.

A That is correct.

Q Then we understand each other.

Then on page 452 of your deposition, when you answered eight, eight is incorrect, there are only five buy indicators and five sell indicators, isn't that so?

MR. BARIST: Objection, your Honor. That is not what the question at 452 said.

MR. SHAFFER: Your Honor, 452 speaks for itself. I have read the question and the answer, and I will move on.

Q Mr. deGive, yesterday in discussing Exhibits 36, 37, 38, 39, 40, and 41, which were your flat charts for the year 1969, you indicated five buying indicators plus six,



seven, eight, two more, a total of ten buying indicators. You said there were three buys, two buys, and then "only after" situations you came up with one, one, one, and two.

Are the five buying indicators on the scroll chart, Plaintiff's 35 in evidence, to be

added to the buying indicators that you mentioned yesterday with respect to the flat charts?

MR. BARIST: Objection, your Honor, both as to form --

MR. SHAFFER: What is wrong with the form?

THE COURT: Are you referring to, are they to be added?

MR. BARIST: Yes.

THE COURT: That might --

Q Do you add that?

THE COURT: Were they added?

Q Were they added?

A I use those indicators in determining buying and selling signals in the market.

Q What I want to know is: Taking in conjunction all the charts for the year 1969, which include the flat charts and the scroll, tell me what the total number of buy indicators are that you utilized in applying your system.

1 [654] deGive - direct A-524  
2 A Your Honor, I would like to have the charts  
3 back again. I can't remember the totals that easily.

4 Q You may have them.

5 THE COURT: All right.

6 A And if it please your Honor, could the Court  
7 total them as I go through them?

8 THE COURT: No. I will take notes.

9 MR. BARIST: Your Honor, we have been trying to get  
10 exhibits. I missed the last answer. Could I have it  
11 read, please.

12 THE COURT: Read back the last few questions  
13 and answers.

14 (Record read)

15 MR. KAMERMAN: Plaintiff's Exhibits 36 to 41  
16 (handing to the witness).

17 THE COURT: Let me interrupt you now. There is  
18 no objection by counsel, but if we take Mr. deGive's  
19 answers of yesterday afternoon --

20 MR. SHAFFER: I agree.

21 THE COURT: -- and if we take his answers of  
22 this morning, don't we really have the answer to that  
23 question?

24 MR. SHAFFER: I think we do. I don't want to  
25 go through a laborious thing all over again.



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THE COURT: All right.

MR. SHAFFER: I just want to ask one question to see if I can put them together.

THE COURT: All right.

Q Mr. deGive, if we take your answers of yesterday afternoon and take your answers with respect to the chart this morning, on buying indicators, don't we get to a total number of buying indicators you look at to determine whether there is a buy signal?

A Yes.

Q All right.

A Some of lesser importance.

Q Yes, I understand. For sell indicators don't we do the same thing with respect to your answers of yesterday and your answers of this morning relating to the scroll chart, get a total number of sell indicators, some of lesser importance?

A Yes, sir, that is correct.

Q Do you agree with me that prescindig for a moment from those of lesser importance and those of greater importance, there are fifteen buy indicators and there are twenty sell indicators? Do you agree with that?

A I don't have that calculation, your Honor.

Q Look at your charts. You just said that --

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THE COURT: I don't really think --

MR. SHAFFER: It is important for this, your Honor.  
We get into --

THE COURT: If he says yes --

MR. SHAFFER: I can move on.

THE COURT: Or even if he -- well, let us assume  
he says yes to your question.

MR. SHAFFER: All right.

THE COURT: We still have to get to the point that  
I assume you are working toward, which is: On a particular  
occasion, since you say that all of these were the buy  
and sell indicators which you used during the period in  
question, are there not some that you did not use on  
such-and-such occasion or such-and-such a date? Isn't that  
where you are headed?

MR. SHAFFER: No, not really.

THE COURT: No?

MR. SHAFFER: It will be very apparent in a  
minute.

THE COURT: All right.

MR. BARIST: I am sorry. I want to object to  
this, because I don't see the relevance of whether there  
are seventeen or sixteen or eighteen. The man has  
testified that there are some of lesser importance, there



are some which he used only in an "only after" situation. To come up with a number game, to me is not helpful to either the Court or the progress of this trial.

THE COURT: I must say that it does not seem as if it is apt to be, no matter where you hit it, because it --

MR. SHAFFER: Your Honor, I can understand that your patience would be taxed and I can understand that Mr. Barist could claim he does not see the relevance, but it will be most relevant and it will be most apparent, and we are very rapidly approaching that point.

THE COURT: All right.

MR. SHAFFER: If I could just have a little head with the witness, I am sure that within the rules of evidence we will get that.

THE COURT: Go ahead.

Q Mr. deGive, when you got a certain percentage of your indicators giving you a buy signal, didn't you buy, as a practice in applying your system in 1969 to my client's account?

A Before --

Q Just yes or no.

MR. BARIST: If the question can be answered yes or no.



MR. SHAFFER: Certainly if it can be answered yes or no. He has answered it before yes or no.

Q Go ahead, Mr. deGive, try yes or no.

THE COURT: Read the question, please.

(Question read)

A I can't answer that question yes or no, your Honor.

Q You cannot. All right.

MR. SHAFFER: Page 436, Mr. Barist, of Mr. deGive's deposition -- I take that back -- 437A of the deposition.

Q "Question: What is the statistic of indicators that have to confirm each other on these charts that would have to be present as an indicator to buy?

"Answer: The normal, the same.

"Question: 60 percent?

"Answer: Yes.

"Question: And if you saw 50 percent, would you buy?

"Answer: Yes, I would buy on 50 percent of the indicators signaling a buy or signaling buy."

Did you give those answers to those questions?

A I did.

Q Were they true when you gave them?

A They were.



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Q Are they true today?

A Yes.

Q Mr. deGive, what is the percentage of indicators that you would move on in 1969 in applying the system to my client's account with respect to a sale?

A I used the indicators to purchase or to sell by looking at all of the indicators to buy and sell -- or to sell, that I had characterized as indicators to buy and indicators to sell.

Q Mr. deGive, I just asked you: What percent of indicators, sell indicators, would you move on with respect to my client's account in 1969?

MR. BARIST: I thought that question was just asked and answered, your Honor.

THE COURT: You are asking about sell now?

MR. SHAFFER: Yes.

THE COURT: No, the other question was buy.

Q Sir? Just a number, a percent number.

A Will you ask the question again, on the buy?

Q No. We are talking about sell now. You have answered the buy.

A I would move on the sell signal with the same conclusions that I had made on the buy signal.

Q Just a number. What is the percentage, sir?



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A That is the reason I asked the question on the buys before. I wanted to remember the percent I said.

Q I cannot help you. You have the system. I want to know how you used it. If you cannot remember, it must not have been much of a system.

MR. BARIST: Objection, your Honor.

THE COURT: Strike it.

Q What percent of the indicators would you make a sale on, Mr. deGive, in 1969, using your system?

A I would make a sale if all the indicators that I looked at and kept for sales were giving me sell signals.

Q If they all did I am sure you would. I want to know, what is the minimum number of indicators you would make a sell move on, expressed in the percentage of the total number of sell indicators?

MR. BARIST: Objection to the form.

THE COURT: Overruled.

MR. BARIST: Your Honor, may I point out that the question was preceded by counsel's comment, "I am sure that you would if they all were."

THE COURT: Overruled.

Q Go ahead, Mr. deGive.

A I would have moved on 50 percent or more, but I didn't.



MR. SHAFFER: That is an answer, Judge.

THE WITNESS: Your Honor, I said I would have moved -- may I rephrase that: I would have moved on a minimum of 50 percent, but I did not move on a minimum of 50 percent during that period; it was more.

Q How much more?

A I moved on signals after looking at all of the indicators to sell that I had and deciding in my judgment that they were giving me sell signals. There may have been one exception, of one indicator.

MR. SHAFFER: Judge, I move to strike that answer as not being responsive, although there was no question to be responsive to, so I withdraw my motion.

Q Could you express in a percent, which we would add to 50 percent, how much more you needed to make a selling move? -- in 1969, of course.

MR. BARIST: Your Honor, at this time it seems to me that what is being done here is that the witness is being examined as to hypotheticals. What would you have done?

THE COURT: Objection sustained to the extent that it appears to be hypothetical.

MR. SHAFFER: Yes, your Honor, I understand.

MR. BARIST: Could I point this out, your Honor:



2 that the witness in response to the last series of questions  
3 has just very clearly stated that as soon as he was  
4 confirmed, in buying and selling in 1969, he looked at  
5 all the indicators when he was buying and selling for  
6 Mrs. Van Alen's account. I don't see what purpose it  
7 then serves to go on through a series of hypothetical  
8 questions as to how the system could or could not  
9 operate.

10 THE COURT: I have sustained your objection to  
11 the hypothetical aspect of the question.

12 MR. SHAFFER: Your Honor, at this point I am  
13 going to ask the Court to make a ruling that will apply  
14 to both counsel.

15 THE COURT: I know what it is, and I accept it,  
16 and that is that counsel, if he has an objection, if he  
17 can give me a rule number, do that; if you cannot, just  
18 state in a word or two what the objection is. Do it in  
19 that fashion. That is all right too. But I think we  
20 will discontinue what is essentially full-blown  
21 explanations for a particular objection or motion. That  
22 applies to both sides.

23 MR. SHAFFER: Yes, your Honor.

24 Q Mr. deGive, in 1969, as you operated your  
25 system, what was the minimum percent of sell indicators



1                   [663]                   deGive - direct                   A-533  
2                   you acted on to make a sale?

3                   MR. BARIST: Objection.

4                   Q       For my client.

5                   THE COURT: Overruled.

6                   MR. BARIST: Your Honor, I don't think the  
7                   witness knows that there is a question pending. I don't  
8                   think he heard your Honor's ruling.

9                   THE COURT: Yes, you may answer.

10                  THE WITNESS: Oh, I am sorry. Would you repeat  
11                  the question?

12                  MR. BARIST: Off the record a second, your  
13                  Honor? I just want to approach the bench. I believe  
14                  that the witness is slightly hard of hearing in one side.  
15                  I don't know if it is the side which is toward your  
16                  Honor.

17                  THE COURT: All right.

18                  Read the question, please.

19                  (Question read)

20                  A       Your Honor, I believe I answered that question  
21                  previously when I said that I consulted and examined all  
22                  of the indicators before making -- all of the selling  
23                  indicators before making a decision for Mrs. Alen at  
24                  that time, but there may have been one exception.

25                  MR. SHAFFER: I move that the answer be stricken,

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2

your Honor, as not responsive to the question.

3

THE COURT: Overruled. Denied.

4

Q Mr. deGive, does that mean a hundred percent?

5

A I said all of the indicators.

6

Q Is that a hundred percent?

7

MR. BARIST: Objection.

8

THE COURT: I will allow it.

9

Q The judge said he would allow it. Does that mean a hundred percent?

10

11

A With one exception, yes. The selling indicators when I made a sale.

12

13

14

Q Referring your attention to page 436 of Mr. deGive's deposition testimony:

15

16

"Question: And if 60 percent of your indicators were declining, would you consider that it was time to sell?

17

18

"Answer: It would be matter of degree. It would influence the amount too.

19

20

21

22

"Question: Well, if you saw 60 percent of the indicators declining on October 28, 1968, would that indicate to you to sell out the entire account of Mrs. Van Alen at Dominick?

23

24

25

"Answer: Yes."

Did you give that answer to that question?

A Yes, but I didn't say I did it.



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Q Did you give the answer to the question?

3

A I did.

23

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Q Was that answer true when you gave it?

5

A Yes.

6

Q Is it true today?

7

A Yes.

8

Q Was your system the same in 1969 that it was in

9

1968 with respect to my client Mrs. Van Alen?

10

MR. BARIST: Objection. Your Honor, the witness

11

was in the middle of an explanation, which I believe he has

12

a right to give.

13

THE COURT: I was not aware of it.

14

MR. SHAFFER: Nor was I, Judge.

15

MR. BARIST: I heard him mention some words.

16

MR. SHAFFER: Perhaps he could cover it in

17

redirect.

18

THE COURT: Have you completed your answers?

19

This last one?

20

(Record read)

21

THE COURT: The outstanding question is: Was

22

the system the same in 1969 --

23

Q -- as it was in 1968 with respect to your

24

application to my client's accounts?

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A Yes.

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Q The same in 1970?

A Yes.

Q How about 1967? The same?

A Yes.

Q Which was it, Mr. --

MR. BARIST: Excuse me, your Honor. At this point I would like to move to strike all the testimony with respect to what he would have done as phrased either in the deposition or in the transcript this morning as a hypothetical.

THE COURT: No, denied. And having in mind issues in this case which involve motive and intent, though not limiting it to that alone. Next question.

Q What was the standard, Mr. deGive, 60 percent or 100 percent of your indicators?

MR. BARIST: Objection, your Honor.

THE COURT: The question, I think, is incomplete.

MR. SHAFFER: Withdrawn.

Q Mr. deGive, if 60 percent of your indicators in 1969 were giving you a buy signal and 40 percent of your indicators from which you determined a buy signal were not giving you a buy signal, would you buy for Mrs. Van Alen's account?

MR. BARIST: Objection.



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THE COURT: Sustained; asked and answered.

MR. SHAFFER: If you say there was an answer to it, we will go on.

Q Mr. deGive, I want to know with respect to Plaintiff's Exhibit No. 35 in evidence, the big scroll, did you ever show that chart as it then existed to my client before today?

A I could have, yes. I say I could have.

Q Do you recall having done so?

A I recall Mrs. Van Alen coming to the office at one time, and it would have been the thing to do, yes.

MR. SHAFFER: Judge, I would like to move to strike that answer to my question.

THE COURT: No.

MR. SHAFFER: Because the answer is, does he --

THE COURT: I will allow it. If you wish to inquire further, you can.

MR. SHAFFER: Thank you, Judge.

Q Mr. deGive, I am asking you whether you recall as something now in your memory that you can tell his Honor you remember on one occasion or an occasion showing it to my client.

A I don't remember.

Q Was my client in your office?

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THE COURT: He said she was.

Q Do you recall when my client was in your office?

A Some time in October of 1969, to the best of my recollection.

Q Where did you keep that chart in your office?

A I had one or four files, your Honor, because of the number of charts that I was keeping. One file kept the flat charts, which are bound and were calculated each week and brought back, and any other flat charts of stock prices, etc.

And I had another unit where I kept the rolled-up charts in previous years of this large chart.

Q Was it black?

A I don't remember what color it was.

Q Have you still got it?

A No, I don't.

Q When did you get rid of it?

MR. BARIST: Objection, your Honor.

MR. SHAFFER: Testing credibility, Judge.

MR. BARIST: It is so collateral at this point, your Honor, I think it is a waste of everyone's time as to when he got rid of the files.

THE COURT: It might well be. I would be interested in it if you would pursue it and a description



1  
2 of how the rolled-up charts were kept.

3 Q How were the rolled-up charts kept, Mr. deGive?

4 A To the best of my recollection, the rolled-up  
5 charts were kept in a box that was built to hold a  
6 series of charts for each year. It was a vertical box  
7 with shelves, and the charts were rolled up on a stick to  
8 keep them straight so that they did not bend. And I would  
9 keep a series of days and/or weeks or months in the large  
10 chart, and when it got too large to be cumbersome, I would  
11 roll it up and put it into the slot and then start a new  
12 series of charts.

13 THE COURT: What about 35? How was that kept  
14 so that it was manageable for your handling?

15 THE WITNESS: This chart?

16 THE COURT: 35, yes.

17 THE WITNESS: I had a table that I spread it out  
18 on to make calculations and to make analysis.

19 THE COURT: Was it kept anywhere when it was not  
20 on the table?

21 THE WITNESS: Yes. It was kept in that filing  
22 unit where all the other previous charts were, because I  
23 liked to consult with previous years of those charts from  
24 time to time. If I was coming to a major bottom or major  
25 top, to compare the material, just for my own personal

1 observation as to how it had been at previous periods.

2 THE COURT: When it was kept in that box or --  
3 is that what you call it?

4 THE WITNESS: No, it wasn't a box. It was a  
5 vertical shelf with pigeonholes.

6 THE COURT: Was it on one or more rollers when  
7 it was not on the table?

8 THE WITNESS: It was -- each year usually was  
9 rolled up and inserted, and I believe I used to mark the  
10 year on it, 1965, and that was the '65 chart, the next  
11 year '66, the next year '67, and I kept a record of them.

12 THE COURT: As I look at it here, it looks like  
13 a single elongated piece of paper.

14 THE WITNESS: That is correct.

15 THE COURT: Was that kept in 1969 on a single  
16 roller or on more than one roller? In other words, would  
17 you have two rollers, one at each end, to make it easier  
18 to roll it out?

19 THE WITNESS: No.

20 THE COURT: Or would you have a single roller?

21 THE WITNESS: I had a single roller.

22 THE COURT: And when it was not spread out, was  
23 not spread out on the table, was it rolled up completely  
24 or not?  
25



1 THE WITNESS: Yes. I would roll it up, and I  
2 had a space for that particular year, and I would insert  
3 it so that the cleaning woman or someone else didn't throw  
4 it away.  
5

6 THE COURT: Go ahead, Mr. Shaffer.

7 Q This chart is more than one year, isn't that so,  
8 this Plaintiff's 35, the large scroll we have here?

9 A Yes.

10 Q And you have since pasted portions together to  
11 make that chart as long as it is today, isn't that so?

12 A Yes.

13 Q And back in 1969 you had earlier portions of  
14 that chart that were not attached to the roll, isn't that  
15 so?

16 A Could have been.

17 Q Right. So you might have had '66 on one roll  
18 on one page or roll and '68 on another roll on another  
19 page or roll?

20 A Correct.

21 Q But 35 today consists of the '66 pigeonhole  
22 portion, the '68 pigeonhold portion, and so forth, all  
23 put together.

24 A Yes.

25 Q These flat charts, you did store them in a



place from which they hung vertically, isn't that so?

A Flat charts?

Q Yes.

A Which flat charts?

Q At the time flat charts which are not the scroll chart.

A These?

Q Yes.

A Those charts were in books lying flat. They were in looseleaf books and they were recorded on the front of it as what the chart was, and it was a flat book that included this sheet.

THE COURT: Let the record show the witness has been holding up Plaintiff's 36 through 41 in evidence as flat charts.

MR. SHAFFER: Your Honor, I don't want to be too forward, but would you allow a five-minute recess at this point or a seven-minute, take the morning recess?

THE COURT: All right.

MR. SHAFFER: Thank you.

(Recess)

Q Mr. deGive, I show you what has been marked as Plaintiff's 2 in evidence.

MR. SHAFFER: Maybe I can get your copy.



1  
2 Q Mr. deGive, if you will turn to page 4 of  
3 Plaintiff's Exhibit 2, it shows that on October 14 and  
4 October 15 you made the transactions that are reflected on  
5 all items on the first column of that page but the first  
6 one, and all items on page 5 in the first column, with  
7 the exception of the last two items on that page, and that  
8 they were purchases. Is that so?

9 MR. BARIST: Conceded.

10 Q Do you see that?

11 A Oh, yes.

12 Q When you were making those purchases, was that  
13 a major move in Mrs. Van Alen's account at the time?

14 A It was.

15 Q Do you know whether or not those purchases were  
16 purchases in an intermediate oversold condition or whether  
17 you had the confirmation of the six-week material?

18 MR. BARIST: Objection to the form only. It is  
19 compound.

20 THE COURT: Sustained.

21 Q At the time that you made that purchase or those  
22 purchases, were you buying in an intermediate oversold  
23 condition?

24 A Yes. And the other material was favorable also.

25 Q What other material?



1

2 A The longer term material.

3

Q What longer term material?

4

A Fifty-five sixty day.

5

Q Did you consider it a long-term buy?

6

MR. BARIST: Objection to the form.

7

MR. SHAFFER: Nothing wrong with that, sir.

8

THE COURT: Overruled.

9

A When I made those purchases --

10

Q Could you try yes or no and then explain.

11

A Did I consider them a long-term buy?

12

Q Yes.

13

A At the time, yes.

14

MR. SHAFFER: What is the next plaintiff's

15

number, please?

16

Your Honor, I offer to be marked for

17

identification as Plaintiff's Exhibit 60 what has up to

18

now been marked Defendants' Exhibit 116 for identification,

19

and it is --

20

MR. BARIST: Number on that, on the 116? There

21

is a number on 116.

22

MR. SHAFFER: 327.

23

MR. BARIST: May I see it a moment, please?

24

MR. SHAFFER: Yes. And 328. This is Exhibit

25

No. 60. It is Defendants' 116 for identification, and



1 THE WITNESS: He first asked me the question  
2 about a six weeks up cycle in the market and asked me if  
3 it was an up cycle, and he didn't say an up cycle in the  
4 price of the market. It would be if I said a six weeks  
5 advance in the market would be to expect a six weeks  
6 advance. Then he started to argue about six weeks of  
7 oscillators of the material. In other words, when I  
8 signaled an intermediate advance in the market, I expected  
9 the market to go up.  
10

11 Q In price.

12 A In price. Then he transferred over to the  
13 oscillators. Now, there are times when the oscillators  
14 can go up before the market starts up, showing an  
15 improvement in the basic structure of the market. And  
16 from July of 1969 until October, the Dow Jones Industrial  
17 Average went sideways, and my oscillators improved.  
18 Therefore, the market did not go up when my oscillators  
19 were improving from July to October.

20 Q Have you finished your explanation?

21 THE COURT: He apparently has.

22 Q Mr. deGive, consulting Plaintiff's Exhibit 2 in  
23 evidence, on page 5, do you see the 500 American Smelting  
24 and Refining that you bought on October 14, 1969, the  
25 second item?



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A Yes.

Q You sold that on November 11, didn't you?

MR. BARIST: Conceded.

A Yes.

Q And then, dropping down and skipping two items to Chromalloy, you sold that on November 11, didn't you?

A I did.

Q Then skipping down about ten or eleven items, you come to Litton Industries. You sold that, didn't you?

A I did.

Q On November 11?

A I did.

Q Then skipping down four more items, you sold Republic Corporation on November 11?

A I did.

Q Skipping down to Sangamo, you sold that on November 11?

A I did.

Q So, of all the issues that you bought on October 14 or 15, 1969, or that you bought in October 1969, on whatever date you bought them, you sold those four issues on November 11?

MR. KAMERMAN: Five issues.

Q Five.



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MR. BARIST: Five issues on November 11.

Q Is that right?

MR. BARIST: Conceded.

A Yes.

Q Mr. deGive, I want to show you what I offer to be marked as Plaintiff's Exhibit 61 for identification, and it was Plaintiff's 10 for identification, and your number in the upper left-hand corner is 331.

MR. BARIST: From 116.

MR. SHAFFER: Yes, that is from the Technical Comments.

Q And I want to show you your Technical --

MR. SHAFFER: Let me get it marked first.

THE COURT: Counsel, if you would restate it.

Q I am showing you what has been marked as Plaintiff's Exhibit 61 for identification.

MR. SHAFFER: Your Honor, that is a Technical Comment dated September 10, 1969.

THE COURT: Does that have a defendants' number? 116, number what?

MR. SHAFFER: It is 331.

MR. BARIST: Is now Plaintiff's 61?

THE COURT: All right.

2 Q Mr. deGive, is that one of your Technical  
3 Comments or the Technical Comment dated November 9, 1969?

4 A It is.

5 Q Did you prepare it?

6 A I did.

7 MR. BARIST: To make it easier on these  
8 Technical Comments, we have stipulated before the trial  
9 that they are Mr. deGive's Technical Comments.

10 MR. SHAFFER: I offer it in evidence.

11 THE COURT: Received.

12 MR. BARIST: No objection.

13 (Plaintiff's Exhibit 61 received in evidence.)

14 Q Mr. deGive, on the day before you sold those  
15 selected issues that we just agreed were five in number,  
16 having been purchased in October of 1969, you said in  
17 your Technical Comment, "The market is now nearing the  
18 end of a six-week up cycle and will become increasingly  
19 selective. Accordingly, new buying should be deferred for  
20 the present." And you went and on the next day sold those  
21 five issues; right?

22 A Yes.

23 Q Why didn't you sell them all, all the October  
24 purchases?

25 MR. BARIST: Your Honor, besides the form of

XXX



1 the question, it seems to me the relevance seems strange  
2 in a case where they are complaining that he made  
3 purchases and sales too quickly together, why he is now  
4 complaining that he did not sell all of the issues in  
5 November.  
6

7 THE COURT: Overruled.

8 A In my analysis of the technical material, it  
9 was my judgment at that time that the uptrend was still  
10 intact.

11 Q Why did you defer new buying?

12 A Because after a six-week cycle peak, the normal  
13 expectation -- in a broad uptrend, the normal expectation  
14 is for a period of consolidation and/or minor decline,  
15 within the framework of the longer term trend.

16 Q Did you have a sell signal on November 11, 1969?

17 A I said the six weeks up cycle was coming to an  
18 end.

19 Q I know, but you get a sell signal from more than  
20 the six-week up cycle, don't you?

21 A It was not conclusive.

22 Q Do you get more than --

23 MR. BARIST: Excuse me, Mr. Shaffer, I think he  
24 answered the question that is outstanding.

25 MR. SHAFFER: All right, I am asking him another

one. Is it all right?

MR. BARIST: Yes.

Q Did you get a sell signal for more than the six-week up cycle indicator?

MR. BARIST: Objection to the form.

THE COURT: You may answer it if you can answer that. You may answer it.

A In analyzing all of the technical material that I used to make my judgments, there was no long-term signal in the market at that time -- long-term sell signal.

Q Well, why did you sell on November 11?

A Why did I sell?

Q Why? You did not have a sell signal.

A On those securities?

Q Yes.

A You are assuming that every stock in the market goes up with the Dow Jones Average, the same percent and at the same rate and at the same time. That is not the case in the market. There are Dow Jones averages and leading stock averages being up, and you will witness with a lot of stocks that do not move or that go down.

Q Did you apply a system to my client's account in November of 1969 and buy across the board a cross-section



1 [687]

deGive - direct

A-551

2 of the stock market, or were you trading for her in  
3 selected issues?

4 A I was buying a cross-section of the stock market  
5 when I bought for her, a cross-section of stocks that had  
6 declined more than the market in the previous decline,  
7 had declined equal to the market, and had acted better  
8 than the market.

9 MR. BARIST: Excuse me, your Honor. I think, and  
10 I could be wrong, that Mr. Shaffer inadvertently said when  
11 you bought in November 1969. I think he meant to say in  
12 October 1969.

13 THE COURT: I daresay you did. Right?

14 MR. SHAFFER: Yes.

15 THE COURT: Does that change your answer in  
16 any way?

17 THE WITNESS: No.

18 THE COURT: All right.

19 Q In November of 1969, when you sold those stocks,  
20 how did you pick them as the ones to sell?

21 THE COURT: Referring to November?

22 MR. SHAFFER: November, yes.

23 A Those stocks were not acting with the market.

24 Q As a matter of fact, those stocks produced a  
25 profit, didn't they? Just yes or no if you can.

1 [688] deGive - direct A-552  
2 A Now, that is quite interesting, because it was  
3 my impression at the time I was taking short-term gains,  
4 but I see on this chart it is recorded as a loss.

5 MR. BARIST: It is reverse. Parentheses on that  
6 chart --

7 MR. SHAFFER: That was to fool you, Mr. deGive.

8 THE COURT: Strike all of that now.

9 What is outstanding?

10 Q The question is: Those stocks were sold at a  
11 profit, weren't they, Mr. deGive?

12 A Indeed they were. Mrs. Van Alen --

13 Q You have answered the question, there isn't  
14 anything outstanding, and that does not need to be  
15 explained.

16 As a matter of fact, Mr. deGive --

17 THE COURT: Before you go on, though -- one  
18 moment, please -- since we have just brought to your  
19 attention the meaning of those parentheses in the column  
20 marked "loss" on Plaintiff's Exhibit 2 in evidence, does  
21 that cause you to wish to reconsider or change any  
22 answer you have given up to this point?

23 THE WITNESS: It does.

24 THE COURT: In connection with this matter?

25 THE WITNESS: It does.



THE COURT: I think he is entitled to have that opportunity.

Q What would you like to change?

A I sold those stocks in November at the peak of a six weeks up cycle in a broad uptrend and took some short-term gains because Mrs. Van Alen had had short-term losses during that year, and the short-term profit could offset it, part of it.

Q Did you know how much losses you had taken thus far that year -- withdrawn.

Did you know how much losses your trading had incurred for Mrs. Van Alen by November of 1969?

MR. BARIST: Objection to the form -- "your trading had incurred."

MR. SHAFFER: There is nothing wrong with that, Judge. He bought and sold for Mrs. Van Alen, and up to that time there were losses.

THE COURT: If you will just modify it: that resulted from your trading.

MR. SHAFFER: All right, Judge.

THE COURT: Is that satisfactory?

MR. BARIST: Yes, Judge.

THE COURT: Or after you traded, perhaps is better.



Q Following the trading activity in Mrs. Van Alen's account in 1969, by November 11 do you know the amount of losses that had been totaled?

A I knew that Mrs. Van Alen had taken losses in the purchase and sale of securities in 1969 up until that point in excess of \$10,000 or more. I knew that she had carryover losses from 1968, as she told me she had.

Q Why didn't you take more profits? You knew you had not filled the barrel yet, didn't you?

MR. BARIST: Objection.

THE COURT: Sustained as to form.

Q Why didn't you take more profits at that point?

A In analyzing the basic technical material, I did not have a long-term sell signal at that time in the market, your Honor, what I regarded as a long-term sell signal.

Q Well, you did not need a long-term sell signal to sell what you sold on November 11 to take profits. Why couldn't you have taken more profits without a long-term sell signal?

MR. BARIST: I think at this point it is becoming argumentative.

THE COURT: I am going to allow it.

Q Answer it, Mr. deGive.



2 A In analyzing material at that time, I expected  
3 the market eventually to go higher.

4 Q I show you Defendants' Exhibit 45 in evidence.  
5 It is a letter from you, is it not, to Dominick &  
6 Dominick? We concede that, right?

7 A Yes.

8 MR. BARIST: Excuse me, Mr. Shaffer. It is a  
9 letter from Mr. deGive to Mrs. Van Alen.

10 MR. SHAFFER: That is right, correct. It is a  
11 letter from Mr. deGive to Mrs. Van Alen on Dominick &  
12 Dominick stationery.

13 THE COURT: Marked?

14 MR. SHAFFER: 45 in evidence, your Honor, for  
15 the defendants.

16 Q That is a letter you wrote to Mrs. Van Alen in  
17 connection with these sales that occurred on November 11,  
18 is it not?

19 A That is.

20 Q Did you not say in that letter, "While it is  
21 true that things are looking quite discouraging here at  
22 the present time, it should be remembered that such  
23 psychology is required to form an important bottom in  
24 the general market."

25 MR. BARIST: Your Honor, could we have the date



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2

Q No, just: Are they true today?

3

A The answers?

4

Q Yes.

5

A Yes.

6

Q Thank you. When do you see the buy signal in

7

late December 1969?

8

A On this chart?

9

Q Yes.

10

A The buy signal, an intermediate buy signal on

11

this chart would be some time between December 22 and

12

December 29, 1969.

13

Q When you said that the sell signal continued

14

until late December, did the sell signal continue until

15

it was replaced by the buy signal you just identified?

16

A In considering all the material before making

17

my judgment, that is true.

18

THE WITNESS: Your Honor, may I say something?

19

THE COURT: No.

20

MR. SHAFFER: I want to offer in evidence the

21

Eleanor deGive account at Dominick & Dominick, which is

22

part of the stipulated material and marked as Defendants'

23

Exhibit 98E.

24

MR. BARIST: No objection.

25

MR. SHAFFER: It was prepared by counsel for the



1 [710] deGive - direct A-557

2 defendants. I ask that it be marked as Plaintiff's  
3 Exhibit No. 63, and I am going to offer it into evidence,  
4 your Honor, if I may.

5 THE COURT: Any objection?

6 MR. BARIST: No, your Honor.

7 THE COURT: Received.

XXX

8 (Plaintiff's Exhibit 63 received in evidence.)

9 Q Mr. deGive, I want to show you Plaintiff's  
10 Exhibit No. 2 in evidence. You remember those four  
11 issues or five issues that you sold on November 11, 1969,  
12 that had been purchased in the October series of purchases  
13 for Mrs. Van Alen that year. Do you remember those five  
14 issues we discussed earlier this morning?

15 A Will you repeat that question?

16 Q Yes. You have before you Plaintiff's Exhibit  
17 No. 2.

18 A Yes.

19 Q And you do observe that that reflects five  
20 issues of the October purchases which were sold on  
21 November 11, 1969?

22 A Yes.

23 Q And they were the issues that you said you sold  
24 in order to take some profits against accumulated short-  
25 term losses which had been accumulated in Mrs. Van Alen's



accounts up to that time.

A That is correct.

Q Showing you Plaintiff's Exhibit No. 63 in evidence, which is your wife's account, do you acknowledge that on November 10 you began selling for your wife and continued selling through December 10, 1969, so that by December 10, 1969, your wife's account was all in cash?

MR. BARIST: Objection to the form.

THE COURT: Sustained.

Q Do you see and acknowledge from that exhibit that you began selling securities in your wife's account on November 10, 1969, and continued to sell securities in her account through December 1969?

A Yes. Not through December 1969.

Q That is what I said.

A I see here that I sold securities from November 11 through December 10.

Q 1969.

A Yes.

Q On December 10, 1969, was your wife long in any securities in that account?

A I don't remember.

Q Well, it is right in front of you. Why don't you take a look and see if that refreshes your recollection.



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A Repeat your question, please?

Q I will withdraw it.

Mr. deGive, I want to take your attention to February 11, 1969, on Plaintiff's Exhibit No. 2.

On February 11, 1969, through February 12, 1969, and occupying the full column of page 1, the first column, and the first two items of page 2, which carries us up to February 13, 1969, that was a major move in my client's account, was it not?

MR. BARIST: Asked and answered.

MR. SHAFFER: It is true, your Honor, but I am trying to get a beginning point to go into a new area and I hope you will let him answer that question.

THE COURT: All right.

A Yes, that is true.

THE COURT: The answer is yes.

Q That purchase move represents the investing my client's accounts that you had had discretionary power over on that date, does it not?

MR. BARIST: I think that question was also asked and answered, your Honor.

THE COURT: I will allow it.

Q Go ahead.

A That was a substantial move.



2 Q Most of those purchases occurred on either  
3 February 11 or February 12, did they not?

4 A Yes.

5 Q And there was one issue purchased in part on  
6 February 14?

7 A Just a minute. Yes.

8 Q And one issue purchased on February 13.

9 A Yes.

10 Q You had a buy signal at or around that time,  
11 didn't you?

12 A I did.

13 Q And you sold those within seven days, didn't you?

14 A Here is the record.

15 Q Well, did you? Look at it.

16 A It shows that I bought some securities on the  
17 11th and sold some on February 20.

18 Q Doesn't it show more than that?

19 A Some on February 18.

20 Q Let me ask you the question this way: Of those  
21 securities which you bought on February 11, 12, 13 and 14,  
22 were they not all sold by February 18, 1969?

23 A No. I see some sold here on February 20.

24 Q Were they not all sold by February 20, 1969?

25 A On this schedule they were.



Q How about in fact? Is the fact different than the schedule?

MR. BARIST: Your Honor, one, I object to the argumentative nature.

THE COURT: Sustained as to argument to this.

MR. SHAFFER: It is stipulated, your Honor, that those are the transactions between the parties. It has been stipulated that the transactions in my client's account are as represented on that schedule.

MR. BARIST: And that is exactly why he should not be -- and I do not like using such words, but I will -- hectoring the witness as to what a document which we have worked on to stipulate as to what were the transactions says.

MR. SHAFFER: That does not mean I cannot examine the witness, I submit most respectfully.

THE COURT: Next question, please.

Q Were the purchases which you made on February 11 through the 14th, and the sales which you had completed by February 20, a holding for a long term?

MR. BARIST: Would you read back that question?

THE COURT: Were these purchases and sales intended to be held for a long time?

MR. SHAFFER: No, Judge.



[733]

deGive - direct

THE COURT: Is that the question?

MR. SHAFFER: Were they in fact a holding for a long term?

THE WITNESS: Your Honor, would you mind having him read back that question.

MR. BARIST: I would object to the question as to form; argumentative.

THE COURT: Yes, the form might be poor. Sustained.

Q Were those securities purchased on a long-term buy signal, that is, the ones that you bought on February 11, 1969, as you read the signal at or about the time you made the purchases?

A At or about the time I made these purchases I read the signals, it was my -- in my judgment that I was getting a long-term signal in the market.

Q Was that a long-term buy signal?

A A long-term buy -- well, yes, which is up to fifty fifty-five days in terms of time.

Q Up to?

A Yes, I have previously described that fifty fifty-five day cycle, your Honor, as my long-term cycle, I believe.

Q Somewhere before February 20 but after



February 11 did you get a sell signal?

A I did.

Q Was it a sell signal or was it that your buy signal had aborted?

A In analyzing the technical material at the time prior to February 20, including all of my charts, I concluded that I had a sell signal and that I had made a mistake in my buying cycle on February 11. I had made a mistake, because I had not considered one indicator, of all the ones that I was looking at, or had misread it, your Honor.

MR. SHAFFER: Page 93 of his transcript, line 11.

Q "Question: Was 1969 the first year that your impulses told you to sell within a seven-day period?

"Answer: 1969 was the year when the impulses gave a series of abortive signals."

Did you give that answer to that question?

A I did.

Q Was it true when you gave it?

A It was.

Q Is it true today?

A It is.

Q What is an abortive signal?

A May I explain that, your Honor?



2 THE COURT: Yes.

3 Q Please do.

4 A Periodically, after an analysis of the indicators  
5 that I have mentioned for buying and selling to give me a  
6 signal, I get these signals. And over a period of years  
7 part of getting these signals is how they normally -- how  
8 they usually act after you get the signals. In other  
9 words, if the buying is increasing and goes down and then  
10 starts back up again, it is a pattern over a number of  
11 years.

12 Each one of these oscillators works in an oscillation  
13 prescribed of seven days and ten days and eighteen days,  
14 the two buying and selling, and twelve days and thirty  
15 days. Using those oscillators, it is possible to have  
16 an ongoing check on the market to observe whether those  
17 oscillators are moving in the fashion that they have been,  
18 in the manner that they have been doing historically.

19 Now, when they stop moving in the oscillation manner  
20 that they have done historically, then I say they are  
21 aborting in their cycle movement, meaning they are not  
22 carrying through the way their cycles have been in the  
23 past.

24 Q Have you completed your answer?

25 THE COURT: We will assume so.



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Q I am going to take one of these copies, and then I don't need to run back and forth.

MR. BARIST: Excuse me, your Honor, a while ago I gave to Mr. Shaffer another extra copy of the exhibits, so we would not have to hang around the witness.

MR. SHAFFER: Yes, I got it. What is your objection?

MR. BARIST: Hanging around the witness box.

MR. SHAFFER: I had to go and get it. I left it there.

THE COURT: Gentlemen, don't invite the appellate court to admonish me for my failure to admonish both of you.

MR. SHAFFER: All right, sir.

MR. BARIST: I apologize to your Honor.

MR. SHAFFER: I do too, Judge.

Q Now looking at page 3, those purchases were made commencing on April 30, two on April 5 -- that is two on May 5, and over to the next column, the first item on May 5. Is that right?

A Yes.

Q And was that a major move in my client's account?

A Yes.



[739]

deGive - direct

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Q Do you have a recollection of what percentage of the value of her account was accounted for by that series of purchases? Would it be as high as 90 percent, 95 percent, 100 percent?

A I recall that it was a major move, your Honor.

Q Do you recall any percentage? That is all I want.

A Certainly over 50 percent.

Q Of those stocks that you purchased --

A It might not have been, though, because I am not --  
I don't have the record in front of me.

Q You said you think it was a major move, though?

A I regarded that as an important move.

Q Is a major move the same as an important move?

A Yes.

Q Of those stocks that you began to purchase on April 30 and had purchased by May 5, did you sell them all by May 27, 1969?

MR. BARIST: The record so indicates, your Honor.

A It does. I was just checking the record, your Honor. I made today about that parentheses -- I was just checking.

THE COURT: The answer is yes.



1 [740] deGive - direct A-567  
2 Q Mr. deGive, when you made the purchases on  
3 April 30 through May 5 were you buying on a buy signal?

4 A I was.

5 Q A long-term buy signal?

6 A After analyzing the technical charts at that  
7 time, in my opinion it was my judgment that it was a  
8 long-term buy signal, meaning using the fifty fifty-five  
9 day indicator as an addition to all the other indicators.

10 MR. SHAFFER: Your Honor, I cannot move to strike  
11 the answer because it does contain elements that are  
12 responsive, but I request of the Court an instruction to  
13 the witness when he can answer the question yes or no to  
14 do so.

15 THE COURT: So instructed.

16 THE WITNESS: Yes, sir.

17 THE COURT: Next question.

18 Q Mr. deGive, on May 27, 1969, when you sold all  
19 that you had bought on April 30 and May 5, were you acting  
20 on a sell signal?

21 A I was.

22 Q Was it a long-term sell signal?

23 A In the same parameters, using the fifty  
24 fifty-five days, it was.

25 Q Or had the buy signal aborted that you acted on?



1 [741] deGive - direct A-568  
2 A The buy signal would have aborted if I got a  
3 sell signal that quickly, between those two purchases,  
4 after that buy signal.

5 Q Is your answer yes or no?

6 A Yes.

7 THE COURT: The buy signal had aborted is the  
8 answer?

9 THE WITNESS: Yes.

10 MR. SHAFFER: That is what he said.

11 Q Here again, Mr. deGive, as on February 11, which  
12 is a date on which you made a great deal of purchases,  
13 April 30 is a date on which you made a great deal of  
14 purchases.

15 MR. BARIST: Objection to the form.

16 MR. SHAFFER: Withdrawn.

17 Q Mr. deGive, in 1968 --

18 MR. SHAFFER: May I have a moment?

19 THE COURT: We will continue for about twenty  
20 minutes.

21 MR. SHAFFER: I show these papers to Mr. Barist.

22 MR. BARIST: If you are offering that, I have  
23 no objection.

24 MR. SHAFFER: I offer it in evidence, your  
25 Honor. There is no objection.



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deGive - direct

XXX

THE COURT: 66 of plaintiff is received.

(Plaintiff's Exhibit 66 received in evidence.)

THE WITNESS: Your Honor, may I have a glass of water?

THE COURT: Give the witness a glass of water, please.

Counselor, you go ahead. We will get the water.

Q Now I am going to show you what has been marked Plaintiff's Exhibit 66 in evidence and ask you to direct your attention that between the period January 5, 1967, and June 19, 1967, there were no sales of securities in my client's accounts, as reflected on that schedule.

A Yes.

MR. BARIST: Is that January 5, 1967, to when?

THE WITNESS: January 5 to June 19. Up to.

MR. BARIST: To June 19, there were no sales.

That is correct.

MR. SHAFFER: I object, your Honor. I just want the answer from the witness.

THE COURT: I think that is in the nature of a concession.

MR. SHAFFER: Oh, all right.

MR. BARIST: Your Honor, if I could be heard, my point simply on this is: Where we have stipulated to



1 facts and put them in, in the form of schedules, because  
2 no one can either work these things out in their head or  
3 even get them from the documents without laborious work,  
4 I don't think it is either helpful or proper to ask the  
5 witness what the document says. He could make a mistake  
6 in misreading it and so what?  
7

8 THE COURT: In short, I think, counselor, that  
9 this much is so: Where it has been either stipulated  
10 or obviously is not going to be controverted, it is well  
11 for you to introduce it as a flat conceded statement and  
12 move on to the next statement and indeed we can quicken  
13 our work here.

14 MR. SHAFFER: All right, I will try it.

15 THE COURT: Or even lead him through, walk him  
16 through.

17 MR. SHAFFER: All right.

18 Q Mr. deGive, is it not also true --

19 MR. BARIST: Your Honor, I would request an  
20 instruction that Mr. Shaffer no longer approach the  
21 witness box. I think it has reached beyond the permissible  
22 point.

23 MR. SHAFFER: Your Honor, I object to his  
24 position on that, and I would like to be heard.

25 THE COURT: There are schedules being employed.



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[744] deGive - direct A-571

Go ahead and put your question.

Q Mr. deGive, were you making the purchases in my client's accounts in 1967 on buy signals that were given to you by your system?

A Yes.

Q And they were in 1969.

A I said yes, but I would like to have that question repeated.

Q Certainly.

(Question read)

A Yes.

Q Mr. deGive, during the period January 5, 1967 -- withdrawn.

MR. SHAFFER: Your Honor, I would like the record to reflect that on Plaintiff's Exhibit No. 66, on June 5, 1967, 400 shares were bought, 500 shares were bought, and 50 shares were bought.

On June 13, 1967, 1,000 shares were bought, 500 shares were bought, 1,000, 500, and 1,000. The last 500 were warrants.

On January 23, 1967, there was only 100 shares bought.

On February 3, 1967, there was only 100 shares bought.

On March 8, 1967, there was 400 shares bought.

On May 1, 1967, there were 600 shares bought  
and 100 shares.

On May 4, 1967, 50 shares were bought.

On May 8, 1967, 300 shares, 1,000, 300, and  
1,000 were bought.

On May 25, 1967, 100 shares were bought.

On June 13, 1967, 200 shares were bought, 50  
shares, and 100 shares were bought.

On June 14, 1967, 200 shares were bought.

On June 19, 1967, 100 shares were bought.

Your Honor, I would like to call to the Court's  
attention the fact that in Plaintiff's Exhibit No. 2 in  
evidence, on the purchase date of 2/11/1969, 11,000 shares  
were bought. On the purchase date February 12, 1969 --

THE COURT: Excuse me, how many on the 2/11?

MR. SHAFFER: 11,000.

MR. BARIST: Your Honor, if I could be heard?  
Are we having argument on what these schedules mean? --  
because if we are, I think it is inappropriate and that is  
what it seems to me is going on.

THE COURT: No, there is a document in evidence,  
no difference from a witness being on the stand. If you  
ask the witness and you get an answer it is in evidence.



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By James T. H. H. H.